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THE  
ONTARIO LAW REPORTS.

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CASES DETERMINED IN THE COURT OF APPEAL  
AND IN THE HIGH COURT OF JUSTICE  
FOR ONTARIO.

1912.

REPORTED UNDER THE AUTHORITY OF THE  
LAW SOCIETY OF UPPER CANADA

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VOL. XXVI.

EDITOR:  
EDWARD B. BROWN, K.C.

TORONTO :  
CANADA LAW BOOK COMPANY, LIMITED,  
LAW BOOK PUBLISHERS  
32-34 TORONTO ST.

1912

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JUDGES  
OF THE  
COURT OF APPEAL  
DURING THE PERIOD OF THESE REPORTS. .

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died at Toronto on the 11th October, 1912.

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In Hilary Term, 1912, the following gentlemen were called to  
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## ERRATA

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Page 163, 2nd line of head-note, for "general" read "funeral."

" 419, 11th line from the bottom, the last word on the line should be  
"senior"—not "junior."



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# REPORTS OF CASES

DETERMINED IN THE

## COURT OF APPEAL

AND IN THE

## HIGH COURT OF JUSTICE FOR ONTARIO.

[DIVISIONAL COURT.]

McMULKIN v. TRADERS BANK OF CANADA.

D. C.  
1912

March 2.

*Attachment of Debts—Money Deposited in Bank at Branch out of Ontario—Residence of Garnishees—Service of Attaching Order—Locality of Debt—Subrogation of Judgment Creditor to Rights of Debtor—Con. Rules 162, 911 et seq.—Extra-territorial Recognition of Judgment—Residence of Debtor.*

Under Con. Rules 911 *et seq.*, a debt may be attached to answer a judgment, (a) if the garnishee is within Ontario, or (b) if the garnishee is out of Ontario, and the case would fall within one or more of the clauses of Con. Rule 162 (as to service of original process out of Ontario) if the judgment debtor was himself seeking to assert his rights within Ontario.

The money attached was deposited by the debtor in a branch in the Province of Alberta of a bank having its head office in Ontario. The attaching order was served on the bank at the head office, and reached the branch in Alberta before any demand by the debtor:—

*Held*, that the order should be made absolute.

*The King v. Lovitt*, [1912] A.C. 212, distinguished upon the ground that the Rules as to attachment of debts are not based upon the locality of the debts.

The question whether the judgment of an Ontario Court would be accorded recognition in a foreign country is not one to be considered by the Court.

Judgment of FINKLE, Co. C.J., Oxford, upon the trial of a garnishee issue, reversed.

AN appeal by the plaintiff (judgment creditor) from the judgment of FINKLE, Co. C.J., Oxford, upon the trial of a garnishee issue.

The following statement is taken from the judgment of MIDDLETON, J.:—

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—  
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BANK  
OF CANADA

The facts are not in dispute. On the 8th August, 1911, the plaintiff recovered a judgment against one Couldridge for \$211.33. On the 17th August, 1911, the plaintiff obtained a garnishee order *nisi*, attaching any debt due from the Traders Bank of Canada, the defendants in the issue, to the judgment debtor. This order was served on the manager of the Traders Bank of Canada at Ingersoll, on the 17th August, and upon the manager at the head office at Toronto, on the 18th August.

An issue was directed between the attaching creditor and the garnishees for the purpose of determining whether, at the time of the service of the said order, there was any amount owing from the garnishees to the judgment debtor, and whether the garnishee order "was a valid attachment of such debt."

At the trial the learned Judge found against the attaching creditor, no reasons being assigned.

It appeared that, at the time of the recovery of judgment, the judgment debtor had \$3,415 upon deposit in the branch of the Traders Bank of Canada at Ingersoll. This sum was withdrawn, and on the 9th August was deposited with the branch of the bank at Calgary. When the attaching order was served, it was accompanied by a notice addressed to the bank, warning the bank that the money sought to be attached was upon deposit with the Calgary branch. The general manager forwarded the attaching order to Calgary. It reached the Calgary office before banking hours on the 24th. Notwithstanding this, the bank permitted the withdrawal of the whole \$3,415, and it was upon the same day redeposited by the judgment debtor to his own credit "in trust;" and, later on in the same day, the money so deposited was again withdrawn.

February 22. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., TEETZEL and MIDDLETON, JJ.

*J. B. Clarke*, K.C., for the appellant. The question is, whether the order binds the branch of the bank in Alberta. I submit that it does. The bank, not the branch, is the debtor. The branch is merely an agent of the bank for certain purposes. The bank is subject to the jurisdiction of the Courts here. I refer to *Tytler v. Canadian Pacific R.W. Co.* (1898), 29 O.R. 654; *Ferguson v. Carman* (1866),

26 U.C.R. 26; *Prince v. Oriental Bank Corporation* (1878), 3 App. Cas. 325; *The King v. Lovitt*, [1912] A.C. 212. The test is, not the situs of the debt; but, could the debtor sue in Ontario to recover the debt due him by the garnishees? See Con. Rule 911.\*

*R. McKay*, K.C., for the respondents. This money was not a debt in Ontario which could be ordered by the Ontario Courts to be paid over. The Traders Bank of Canada is a corporation having its head office in the Province of Ontario, but it is domiciled in every Province where it has offices. A judgment from this Court would not have the required effect in the Province of Alberta. It is the situs of the debt that governs. In order that the Ontario garnishment process may apply, the debt must be present here in Ontario. I refer to *Deacon v. Chadwick* (1901), 1 O.L.R. 346; *Vézina v. Will H. Newsome Co.* (1907), 14 O.L.R. 658; *Brennan v. Cameron* (1910), 1 O.W.N. 430; *Pavey v. Davidson* (1896), 23 A.R. 9; *S.C., sub nom. Purdom v. Pavey & Co.* (1896), 26 S.C.R. 412; *In re Maudslay Sons & Field, Maudslay v. Maudslay Sons &*

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\*911.(1) The Court or a Judge, upon the *ex parte* application of the judgment creditor, either before or after the oral examination mentioned in Rules 900 to 904 and 910, and upon affidavit by him or his solicitor, or some other person aware of the facts, stating that judgment has been recovered, that it is still unsatisfied, and to what amount, and that some third person is indebted to the judgment debtor, and is within Ontario, may order that all debts owing or accruing from the third person (hereinafter called the garnishee) to the judgment debtor, shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee appear before the Court or a Judge or before such officer as the Court or Judge shall appoint, to shew cause why he should not pay the judgment creditor the debt due from the garnishee to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.

(2) Upon a like application where the garnishee is not within Ontario, and upon its being made to appear on affidavit that the garnishee is so indebted to the judgment debtor and that the debt to be garnished is one for which the garnishee might be sued within Ontario by the judgment debtor, an order may be made that such debt shall be attached to answer the judgment debt; and, by the same or any subsequent order, leave may be given to serve upon the garnishee, or in such manner as may seem proper, a notice (which may be embodied in the order), calling upon the garnishee to appear before the Court or a Judge or before such officer as the Court or Judge may appoint, to shew cause why he should not pay the judgment creditor the debt due from the garnishee to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.

(3) The order allowing the notice so to be given shall limit a time when the motion is to be heard, having regard to the place or country where or within which the notice is to be served.

(4) Where the garnishee is not within Ontario and is neither a British subject nor in British dominions, notice of the order according to form No. 126, and not the order itself shall be served.



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*Field*, [1900] 1 Ch. 602; *Attorney-General for Ontario v. Woodruff* (1907), 15 O.L.R. 416, [1908] A.C. 508; *Parker v. Odette* (1894), 16 P.R. 69, Con. Rule 911.

*Clarke*, in reply.

March 2. The judgment of the Court was delivered by MIDDLETON, J. (after setting out the facts as above):—There is no doubt that, at the time of the service of the garnishee order, the garnishees were indebted to the judgment debtor. The only question is, whether this indebtedness was subject to attachment at the instance of the judgment creditor in the Ontario Courts. This falls to be determined on Con. Rules 911 *et seq.* These Rules were validated by 58 Vict. ch. 13, sec. 42, and 59 Vict. ch. 18, sec. 15. No notice has been served, as required by sec. 60 of the Judicature Act, if it is intended to contend that this legislation is *ultra vires* of Ontario.

By the Rules in question, it is plain that the intention was to make exigible to answer a judgment recovered in Ontario: (a) any indebtedness to the judgment debtor where the garnishee was within Ontario; or (b) where the garnishee was not within Ontario, but the case would fall within the provisions of Con. Rule 162 if the judgment debtor was himself seeking to assert his rights within Ontario. The Rule does not proceed upon any theory as to the *situs* of the cause of action to be taken in execution, but proceeds upon the theory that the creditor has a right to be subrogated to the position of his debtor, and to assert, for the purpose of enabling him to obtain satisfaction of the judgment, any right which the debtor himself could assert. If the garnishee is within Ontario and can be served within Ontario, the judgment creditor is given the right to collect any debt due by him to the judgment debtor. If the garnishee is not within Ontario and cannot be served within Ontario, then a debt cannot be collected under this process unless it falls within the classes enumerated in Con. Rule 162.

This narrows the question for determination to an inquiry whether the debtor could himself sue in Ontario to recover the debt due him by the garnishees.

Before the decision of the Privy Council in *The King v. Lovitt*, [1912] A.C. 212, no one would have doubted this right. The question in that case was not one between the bank and its customer. What was there discussed was the right of New Brunswick to claim succession duty with respect to moneys on deposit in the St. John branch of the Bank of British North America. The head office of the bank was in London, England; the domicile of the testator was Nova Scotia. The right of the Province to tax was said to be limited to assets within the Province. It was argued that the *situs* of this simple contract debt was either at the residence of the debtor—*i.e.*, where its head office was, in London, England—or the domicile of the creditor, *i.e.*, Nova Scotia. The Province claimed that the debt was a debt payable at St. John, and that it was primarily recoverable at St. John; the contract, properly understood, being a contract to be implemented at the branch of the bank in St. John. The Privy Council agreed with this, and thought that the locality of the debt was in truth fixed by the agreement between the parties, and that branch banks, although agencies of the bank itself, for certain purposes, may be regarded as distinct trading bodies.

Had our Rules been based upon the locality of the debt to be taken in execution, this judgment would be conclusive against the attaching creditor; but, if I am right in thinking that this is not the test, then the decision has no application. The sole test given by our Rules is the ability to serve within Ontario, or the ability to bring the case within Con. Rule 162 if service cannot be made within Ontario. Had the contract been made between two residents of Calgary, and had the promise been to pay at Calgary and nowhere else, so that the parties had given as definite and complete a locality to the debt as is possible in the case of simple contract debts, and had the debtor thereafter moved within Ontario, then the debt would none the less be liable to attachment under our Rule, which merely requires the existence of a debt and presence of the debtor within Ontario. The debtor would not be exempt from suit at the instance of his original creditor if found and served within Ontario, because the Courts of Ontario have universal jurisdiction in all personal actions, subject only to their ability to effect service within their own jurisdiction: *Tyler v. Canadian Pacific R.W. Co.*, 29 O.R. 654.

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Upon the argument, much was made of the difficulty that might in some cases arise if the Courts of Ontario were to assume authority to take in execution a debt of this kind, because, it was suggested, foreign Courts might not accord to the judgment of the Ontario Court any extra-territorial recognition. It is a sufficient answer to this to point out that this is a question of policy, affecting those who make the law, and that it cannot be considered by the Courts, who are called upon to administer the law as they find it: *Western National Bank of City of New York v. Perez Triana & Co.*, [1891] 1 Q.B. 304.

But it is not likely that in this case any such question can arise, because, at the time of the original suit, the judgment debtor was resident within Ontario, and he appears to be still here, as he was served with a notice of this appeal at Ingersoll.

The appeal should be allowed, and the garnishees should be directed to pay to the judgment creditor sufficient to satisfy the judgment debt and the costs of the attachment proceedings, of the issue, and of this appeal.

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[DIVISIONAL COURT.]

FRÉMONT V. FRÉMONT.

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March 4

*Husband and Wife—Alimony—Separation Deed—Payment of Gross Sum—  
Absence of Provision for Maintenance of Wife.*

By the terms of a separation deed, husband and wife agreed to live apart, and each agreed not to take any proceedings against the other for restitution of conjugal rights and not to annoy or interfere with the other in any manner whatsoever; the husband agreed to pay the wife \$250; the wife agreed to pay her own debts, save three named accounts, and to support the two children. No provision was made in the deed for the maintenance of the wife; she did not covenant not to claim alimony; nor did she covenant to maintain herself:—

*Held*, that the sum of \$250 could not be regarded as intended for the maintenance of the wife: it was not so stipulated in the deed; and, apart from the fact that the sum was inadequate for that purpose, it might have been a payment made to induce the wife to assume care of the children.

*Atwood v. Atwood* (1893-4), 15 P.R. 425, 16 P.R. 50, considered.

*Held*, also, that the agreement to live apart did not relieve the husband from his obligation to maintain his wife; and, no provision having been made for her separate maintenance, she was entitled to alimony.

Judgment of CLUTE, J., affirmed.

APPEAL by the plaintiff from the judgment of CLUTE, J., at the trial, on the 13th December, 1911, awarding the plaintiff alimony.



The marriage took place on the 16th May, 1904. The parties cohabited until the 16th November, 1906, upon which day a separation agreement was entered into, since when the plaintiff had been maintaining herself and her two children.

The trial Judge found, upon conflicting evidence, that the plaintiff was justified in leaving her husband by reason of his cruelty and misconduct.

February 23. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., TEETZEL and MIDDLETON, JJ.

*G. H. Watson*, K.C., for the defendant, argued that the separation agreement entered into between the plaintiff and the defendant was a complete bar to the action: *Bishop v. Bishop*, [1897] P. 138, at p. 149; *Clark v. Clark* (1885), 10 P.D. 188; *Barry v. Barry*, [1901] P. 87. The payment of the \$250 by the husband to the wife freed the husband from any obligation for maintenance; and the adequacy or inadequacy of this sum made no difference: *Eastland v. Burchell* (1878), 3 Q.B.D. 432; *Biffin v. Bignell* (1862), 7 Ex. 877. The wife's maintenance having been provided for, she cannot sue, any more than could a creditor for necessaries supplied to her, she having no authority to pledge his credit. Counsel referred to *McGregor v. McGregor* (1888), 21 Q.B.D. 424; *Hart v. Hart* (1881), 18 Ch.D. 670; *Atwood v. Atwood* (1893-4), 15 P.R. 425, 16 P.R. 50; *Lush on Husband and Wife*, 3rd ed, p. 417 *et seq.*, p. 487 *et seq.*; *Wood v. Wood* (1887), 57 L.J.N.S. Ch. 1.

*R. McKay*, K.C., for the plaintiff, cited *Lafrance v. Lafrance* (1898), 18 P.R. 62, and *Beatty v. Beatty* (1909), 1 O.W.N. 243.

*Watson*, in reply.

March 4. The judgment of the Court was delivered by MIDDLETON, J.:—The sole question argued before us was as to whether the provisions of the separation deed preclude the action.

By the terms of this deed, the parties agree to live separate from each other, and each agrees not to take any proceedings against the other for restitution of conjugal rights or to annoy or interfere with the other in any manner whatsoever. The husband agrees to pay the wife \$250—\$50 in cash and the balance secured by forty promissory notes for \$5 each, payable monthly.

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The wife agrees to pay her own debts, save three named accounts, and to support the two children.

It is to be observed that there is no provision in this deed relating to the maintenance of the wife. She does not covenant not to claim alimony from her husband, nor does she covenant to maintain herself. The learned trial Judge has taken the view that the mere agreement to live separately does not relieve the husband from his obligation to support and maintain his wife. With this we agree.

A husband, by the act of marriage, undertakes to maintain and keep his wife, unless she commits adultery; and, when she is living apart from him under circumstances which justify the separation, he is bound to maintain her, unless she has expressly renounced her rights, or she has such means of her own as make it unnecessary for him to maintain her. If the husband fails to maintain her, she has what has been called "authority of necessity" to pledge her husband's credit. Mr. Watson is probably right when he takes the position that the same test can be applied to determine the wife's right to alimony as in the case of an action brought against the husband by one who has supplied his wife with necessities; the creditor in the latter case deriving his claim entirely from the wife's implied authority.

The earlier cases made the adequacy of the provision of the husband for his wife's maintenance the test of the limit of her authority. The later cases have departed from this rule; and unless the wife is entitled to relief by reason of fraud or duress, she is now regarded as able to make her own terms, and to agree to accept a stipulated allowance as being adequate for her maintenance.

In this case there is no provision whatever for maintenance, and there has been no release by the wife of her right to be maintained. The wife is entitled to be separately maintained, not merely because the husband has agreed to her living apart, but also because the misconduct found by the Judge justifies a separation.

The case falls within the words of Lush, J., in *Eastland v. Burchell*, 3 Q.B.D. 432, at pp. 435, 436: "If he wrongfully compels her to leave his home, he is bound to maintain her elsewhere, and if he makes no adequate provision for this purpose, she be-

comes an agent of necessity to supply her wants upon his credit. In such a case, inasmuch as she is entitled to a provision suitable to her husband's means and position, the sufficiency of any allowance which he makes under these circumstances, is necessarily a question for the jury. Where, however, the parties separate by mutual consent, they may make their own terms; and so long as they continue the separation, these terms are binding on both."

Here the parties have not made their own terms for the separate maintenance of the wife. The husband has made no adequate provision for her, and she is justified in resorting to the Court for an alimentary allowance.

This case differs from any reported decision; as in all the reported cases where there was separation, either voluntary or on account of the husband's misconduct, the separation deed did contain an alimentary provision. It is impossible to regard the lump sum of \$250 as being intended for the maintenance of the wife. The deed does not so stipulate; and, apart from the fact that that sum is clearly inadequate for this purpose, it may have been a payment made to induce the wife to assume care of the children.

In *Atwood v. Atwood*, 15 P.R. 425, the Chancellor says: "A separation deed may be well upheld by the payment of a sum in gross, and a provision to arise *de anno in annum* is not essential." (See also the same case in appeal, 16 P.R. 50.)

No authority is referred to, and I can find no case in which such a provision was made. A lump sum so paid, enough to produce an adequate income or to supplement the wife's own income, might well be sufficient; but a sum such as that paid here would be so grossly inadequate as to afford in itself conclusive evidence either of duress or improvidence.

In this case it is sufficient to say that upon the deed itself the sum is not accepted in lieu of alimony.

The appeal should be dismissed with costs.

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## [IN THE COURT OF APPEAL]

C. A.  
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## WALLACE v. EMPLOYERS' LIABILITY ASSURANCE CORPORATION.

March 6

*Accident Insurance—Temporary Total Disability—Double Indemnity—  
“Riding as a Passenger”—Injury to Assured on Highway after Alighting  
from Street Car.*

The judgment of MEREDITH, C.J.C.P., 25 O.L.R. 80, upon the facts there stated, was affirmed as to total disability and reversed as to double indemnity—it being *held*, that the plaintiff was not “riding as a passenger” upon the street car from which he had alighted when he received the injuries upon which his claim to the double indemnity was based.

APPEAL by the defendants from the judgment of MEREDITH, C.J.C.P., 25 O.L.R. 80, in an action upon an accident insurance policy, in favour of the plaintiff's claim for temporary total disability and his further claim for double indemnity, upon the ground that, when he sustained the accident in respect of which he claimed, he was “riding as a passenger” upon a public conveyance.

January 23. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, J.J.A.

N. W. Rowell, K.C., for the defendants, argued that the plaintiff was not “riding as a passenger” when the accident occurred. He had alighted, and was merely entitled to the rights of a person on the public highway. The word “passenger” implies an intention to travel, while the plaintiff was at his journey's end, and was on property not controlled by the railway company: Booth's Street Railway Law (1892), sec. 326; see note on p. 445 and case of *Creamer v. West End St. R.W. Co.* (1892), 31 N.E. Repr. 391, there cited; also *Platt v. Forty-Second St. and Grand St. Ferry R.R. Co.* (1874), 2 Hun (N.Y.) 124. On the question of intention, he referred to Am. & Eng. Encyc. of Law, 2nd ed., vol. 1, p. 305, and cases there cited, especially *Hendrick v. Employers' Liability Assurance Corporation* (1894), 62 Fed. Repr. 893. He referred particularly to the case of *Anable v. Fidelity and Casualty Co. of N.Y.* (1906), 63 Atl. Repr. 92, affirmed (1907), 74 N.J.L. 686. He also referred to *Ætna Life Insurance Co. v. Vandecar* (1898), 86 Fed. Repr. 282. On the other point in the case, the evidence, while somewhat conflicting, shewed that the plaintiff was not wholly disabled by the accident, as he assisted his wife in looking after the heating of the premises of which



they jointly had a lease, and in the buying of necessary stores, so that he was not entitled to the benefits under the policy arising from total disability: *Am. & Eng. Encyc. of Law*, 2nd ed., vol. 1, p. 336, and cases there cited.

*D. Urquhart*, for the plaintiff, argued that there was ample evidence to support the finding of the learned trial Judge that the plaintiff's injury wholly incapacitated him from business: *Young v. Travelers Insurance Co.* (1888), 80 Me. 244; *Hooper v. Accidental Death Insurance Co.* (1860), 5 H. & N. 546. On the other point, reference was made to *Theobald v. Railway Passengers Assurance Corporation* (1854), 10 Ex. 45, as the earliest case on the subject. That case was followed in *Powis v. Ontario Accident Insurance Co.* (1901), 1 O.L.R. 54, and shews that a passenger remains a passenger until he has safely landed at his destination. The plaintiff could not be said to have alighted safely from the car until he had got a foot-hold upon the street which he could maintain. Reference was made to the following cases and authorities: *Nellis on Street Railways*, 2nd ed., secs. 260, 261; *Northrup v. Railway Passenger Assurance Co.* (1871), 43 N.Y. 516; *May on Insurance*, 4th ed., secs. 521, 524-529 (incl.); *Tooley v. Railway Passenger Assurance Co.* (1873), 2 Ins. L.J. 275.

*Rowell*, in reply, argued that the cases cited on behalf of the respondent were not applicable, and that the *Anable* case covered the whole ground.

March 6. *MACLAREN, J.A.*:—This is an appeal by the defendants from a judgment of *Meredith, C.J.*, without a jury, awarding the plaintiff \$1,300 for 26 weeks' total disability from injuries received after alighting from a street car in Toronto. The defendants had issued a policy in the plaintiff's favour, insuring him against injuries for \$25 a week for "temporary total disability;" the amount to be \$50 a week if the injuries were sustained "while riding as a passenger in or upon a public conveyance."

The claim was resisted on the ground that the plaintiff's illness and disability were caused not by the alleged injury, but were due to locomotor ataxia or an aneurism. The trial Judge found for the plaintiff on this issue; and, although urged in the reasons for appeal, it was abandoned in the argument before us.

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Another ground of defence was, that the plaintiff was a commercial traveller, but before the accident in question he had ceased to be such, and had become the keeper of a boarding-house, and had followed this business during the period claimed for. "Temporary total disability" is defined in the policy as arising from injuries resulting in the "assured being immediately, continuously, and wholly disabled, and thereby prevented from transacting any and every kind of business pertaining to his occupation." The trial Judge found as a fact that the boarding-house business was his wife's, and not his; and that the trifling assistance he gave her was not sufficient to affect his claim. This finding seems to be amply justified by the evidence, and the appeal on this ground should be dismissed.

The third ground of appeal is more serious. It is contended by the defence that, even if the plaintiff were entitled to \$25 a week, he is not entitled to \$50 a week, or the double allowance, as his injuries were not sustained while he was "riding as a passenger in or upon a public conveyance."

The word "passenger" had been variously defined, and it is difficult to frame a definition that would be of general application. It usually means one who travels or is carried in a vessel, coach, railway or street car, or other public conveyance, entered by fare or contract express or implied. The precise time at which the traveller becomes a passenger or ceases to be such depends upon the facts of the particular case. If the carrier owns or controls the station, platform, or other premises where the journey begins or terminates, the relation of carrier and passenger may begin sooner and terminate later than in the case of a tram or street car, where the carrier has no control over the place of departure or arrival. In the present case we have not to determine whether the plaintiff had ceased to be a passenger with reference to the Toronto Railway Company when he received the injury complained of, but whether at that time he was "riding as a passenger in or upon a public conveyance."

The facts of the case as given by the plaintiff in his evidence are quite simple. He was a passenger on an open street car in the city of Toronto, which stopped to let him off at the regular stopping place, just opposite his home. When he stepped on the ground, an automobile going in the same direction was about

to run him down, and to save himself he tried to get on the street car again, which by this time was in motion. He says he reached out to catch hold of the handle of the car, and was jerked around, and fell between the car and automobile, his head striking the side of the car as he fell.

We were not referred to any Canadian or English case precisely in point; but there are a number of American cases that are very similar to the present one.

In *Creamer v. West End St. R.W. Co.* (1892), 156 Mass. 320, a passenger had taken one or two steps from where he touched the ground on leaving his car and was struck by another car. The Court said: "We are of opinion that he was not a passenger when the accident occurred, and that he ceased to be a passenger when he alighted upon the street from his car. The street is in no sense a passenger station, for the safety of which a street railway company is responsible. When a passenger steps from the car upon the street, he becomes a traveller upon the highway, and terminates his relations and rights as a passenger, and the railway company is not responsible to him as a carrier for the condition of the street, or for his safe passage from the car to the sidewalk."

In *Platt v. Forty-Second St. and Grand St. Ferry R.R. Co.*, 2 Hun (N.Y.) 124, the plaintiff had left the company's car and was passing the horses which had been drawing it, when one of them injured her. It was held that she had ceased to be a passenger on the car, and that the liability of the company, if any, was not that of a common carrier, but depended upon the principles that apply to all persons lawfully using the highway.

*Anable v. Fidelity and Casualty Co. of N.Y.*, 73 N.J.L. 320 (1906), was an action on a policy in the same terms as the one in this case—providing for double indemnity for an injury "while riding as a passenger in or upon a public conveyance." While the train was at a station, the assured stepped on the station platform to buy a paper. The train started, and the assured grasped the handrail of one of the cars, but fell, and the last car passed over his body, killing him instantly. The trial Judge held that the rights of the parties must be ascertained by the plain natural meaning of the language used; that he was not in a car nor on a car, nor on any part of a train at the time of the injury; that he was insured not simply as a passenger, but was entitled

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to the double indemnity only if the injury was received while within or on the car or other public conveyance, which was considered a less hazardous risk than while in the act of getting on or off, which might involve a considerable degree of peril. This judgment was affirmed and approved unanimously by the appellate Court of eleven Judges: 74 N.J.L. 686 (1907).

The reasoning in this last case commends itself to my judgment. In the present case the plaintiff was not in fact either in or on the car when he received the injury. If he had been, he would not have been injured. It is common knowledge that the vast majority of street car accidents to passengers occur in connection with entering or leaving the car, injuries to those in or on the cars being limited to the rarer cases of collisions or the car running off the track. I do not think that the language of the policy should be strained so as to cover a risk which does not come within its terms; and a risk for which the proper premium was not paid.

I am further of opinion that the plaintiff was not even a "passenger," within the meaning of the policy, at the time he received the injury. He had fully completed the journey for which he had entered the car and paid his fare. The car had stopped at his request at the very spot at which he desired to alight, and with which he was very familiar, as it was almost at his own door. He had completely separated himself from the car and was securely landed on the roadway. His subsequent attempt to lay hold of the car and get upon its steps was not for the purpose of resuming his journey or again becoming a passenger on the car, and was in no way connected with his having been a passenger a short time previously. His position was the same as that of any foot-passenger on the street who might find himself in the same peril, and might try to take refuge from the deadly automobile. But I do not think it is necessary to decide whether, at the time of the accident, he was a passenger or not; it is sufficient that he was not then "riding as a passenger in or upon a public conveyance."

In my opinion, the plaintiff is entitled only to single and not to double indemnity, and the \$1,300 awarded him should be reduced to \$650.

There should be no costs of the appeal.



MEREDITH, J.A.:—The first question is, whether the plaintiff, at the time of his injury, was “riding as a passenger in or upon” the street car; and is not the broader one whether, at that time, he might be considered merely a passenger as against the railway company.

He had been a passenger riding in and upon the street car, but had reached his destination, the car had been stopped to let him down, and he had alighted upon the public road, severing entirely all actual connection between himself and it; but, being put in imminent danger by a rapidly approaching motor car, he caught at the street car again, though it had by that time been started again and was in motion; and, in endeavouring to escape injury from the motor car by getting upon the street car, fell, or was thrown down, coming in contact with the moving cars, and so was severely injured. His purpose in trying to get upon the street car again was not to resume his journey; that was ended; nor was it to begin a new journey; it was solely to escape injury by the negligently-driven motor car. It is idle to say that there was negligence on the part of the railway company, if that would make any difference; how could their servants foresee and be blameable for the misconduct of the driver of the motor car? It was at the plaintiff’s instance, and upon his signal, that the street car was stopped at this alighting place; an entirely proper place to stop for that purpose; the danger was something not foreseen by the plaintiff or any one else, because doubtless not apparent until the motor car was almost upon him; avoidable, with any sort of care on the part of its driver, up to almost the last moment.

Under these circumstances, it is impossible for me to find that the man was “riding in or upon” the street car when he was injured; if he had been in or upon the street car, he would not have been injured as he was. The case would have been different if he had, after alighting, boarded the car again with the intention of resuming his journey, or of beginning a new one; but nothing like that was the case. Their plain meaning ought to be given to plain words, even though the result be different from that which one would prefer. And such is the effect of the cases in the Courts of the State of New Jersey, which, though very much in point, were not referred to at the trial.

The case, therefore, is not one for “double indemnity” under

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the policy in question, but for single indemnity; and the amount of the judgment entered for the plaintiff ought to be reduced accordingly.

The appeal upon the other ground fails entirely; there is ample evidence to support the finding that the plaintiff's injury caused him "temporary total disability," within the meaning of those words contained in the policy.

MOSS, C.J.O., GARROW and MAGEE, JJ.A., concurred.

*Appeal allowed in part.*

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[IN THE COURT OF APPEAL.]

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March 6

REX V. SOVEREEN.

*Criminal Law—Keeping Disorderly House—Indictment at Sessions—Conviction—Evidence to Sustain—Judge's Charge—Reference to Conviction of Previous Occupant—Right of Prisoner, after Indictment Found, to Elect Trial without Jury—Criminal Code, secs. 225, 228, 825, 873—Re-election—Notice to Sheriff.*

The defendant was indicted at the Sessions for keeping a disorderly house, that is to say, a common bawdy house, contrary to secs. 228 and 225 of the Criminal Code, and was tried by a jury and found guilty. Upon a case reserved by the Chairman of the Sessions:—

*Held*, that there was valid evidence that the defendant was the keeper of a disorderly house; and that a reference, in the Chairman's charge to the jury, to a woman who had been previously convicted, was not erroneous.

2. The defendant had been committed for trial by a magistrate, but the indictment on which he was convicted was not preferred by the person (if any) bound over to prosecute, but by the County Crown Attorney, with the written consent of the trial Judge, under sec. 873 of the Code. After a true bill had been found by the grand jury, and before arraignment or plea, the defendant asked to be allowed to elect to be tried by the County Court Judge without a jury under the Speedy Trials sections of the Code:—

*Held*, that he was not entitled so to elect.

*Per Moss, C.J.O.*:—Where a person committed for trial, and whether in custody or upon bail, has not, before a bill of indictment has been found against him by a grand jury, taken the steps necessary to enable him to elect to be tried by a Judge without a jury, he is not, upon bill found and arraignment thereon, entitled as of right to ask to be allowed to elect to be tried without a jury. The right is given only in cases in which the exercise of such an election would or might effect a speedy trial of an accused person, and thereby save the delay which waiting for a trial by jury might involve.

*Per* MACLAREN, J.A.:—It must be assumed that the charge in the indictment was not the same as that upon which the defendant was committed, or as any other charge appearing in the evidence before the magistrate, as, in either of these events, the County Crown Attorney would not, under sec. 871, have needed the consent of the Judge to prefer the indictment; and it is clear from sec. 825 *et seq.* of the Code that a speedy trial before a Judge can be had only upon a charge on which the magistrate has committed the accused, or upon one which appears in the evidence before him. But, even if the indictment had been based upon a charge for which the accused had been committed or which appeared in the depositions, he should have elected before the true bill was found by the grand jury.

*The King v. Komienksy* (1903), 6 Can. Crim. Cas. 524, and *The King v. Wener* (1903), *ib.* 406, approved.

*Per* MAGEE, J.A.:—*Rex v. Thompson* (1908), 17 Man. L.R. 508, approved.

*Per* MACLAREN and MAGEE, JJ.A.:—The defendant, not having given to the Sheriff the notice required by sub-sec. 6 of sec. 825 of the Code (as added by 8 & 9 Edw. VII. ch. 9), was not in a position to claim the right to re-elect.

CASE stated by the Chairman of the General Sessions of the Peace for the County of Norfolk.

The accused, Wilbert Sovereign, was indicted at the Sessions in December, 1911, for that he on the 23rd July, 1911, and on other days and times before that date, did keep a disorderly house, that is to say, a common bawdy house, contrary to secs. 228 and 225 of the Criminal Code, and was found guilty by the jury.

The indictment was not preferred at the instance of the person bound over to prosecute, but by the County Crown Attorney, with the written consent of the Chairman, under sec. 873 of the Criminal Code. After a true bill had been found by the grand jury, but before arraignment or plea, the prisoner desired to be allowed to elect to be tried before the County Court Judge without a jury, under the Speedy Trials sections of the Code. On its being held that he was not entitled so to elect, he pleaded "not guilty."

The Chairman, on the application of the prisoner's counsel, reserved for the Court the following questions:—

1. Was there any valid evidence that the prisoner was the keeper of a disorderly house?
2. Was my charge erroneous as regards the reference made therein to the woman who had been previously convicted?
3. Was the prisoner, in the circumstances above stated, entitled to make an election for speedy trial?

February 20. The case was heard by MOSS, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A., and LATCHFORD, J.

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*J. B. Mackenzie*, for the prisoner, argued that the evidence as to the character of the house under the previous occupant was inadmissible; and that, as the law now stands, a person out on bail is entitled to elect to be tried by a Judge without a jury: Criminal Code, sec. 825, sub-secs. 6 and 7, added by 8 & 9 Edw. VII. ch. 9.\* There is no reported case since the amendment of the Code by the statute of 8 & 9 Edw. VII. Reference was made to the following cases: *Rex v. O'Gorman* (1909), 18 O.L.R. 427; *The Queen v. Laurence* (1896), 1 Can. Crim. Cas. 295; *The King v. Komienksy* (1903), 6 Can. Crim. Cas. 524; *The King v. Wener* (1903), 6 Can. Crim. Cas. 406; *Regina v. St. Clair* (1900), 27 A.R. 308; *Regina v. McNamara* (1891), 20 O.R. 489.

*J. R. Cartwright*, K.C., for the Crown, argued that the evidence was sufficient to support the conviction, and that the prisoner was not entitled to elect to be tried without a jury after a bill of indictment had been found against him.

March 6. Moss, C.J.O.:—We are all agreed that the questions submitted by the learned Chairman of the General Sessions should be answered adversely to the contentions made on behalf of the prisoner.

As to the first and second questions, having regard to the evidence and the charge to the jury, which are made part of the stated case, there can be no reasonable doubt.

The third question affords more room for difference of opinion—not, however, as to what the proper conclusion should be, but rather as to grounds upon which it should be based.

Speaking for myself, and with the utmost respect for those who have indicated or expressed a different view, I think that where, as here, a person committed for trial, and whether in custody or upon bail, has not, before a bill of indictment has been found against him by a grand jury, taken the steps necessary to enable

\*6. A person accused of any offence within sub-section 1 of this section, who has been bound over by a Justice or Justices under the provisions of section 696 and is at large under bail, may notify the Sheriff that he desires to make his election under this Part, and thereupon the Sheriff shall notify the Judge, or the prosecuting officer, as provided in section 826.

7. In such case, the Judge having fixed the time when and the place where the accused shall make his election, the Sheriff shall notify the accused thereof, and the accused shall attend at the time and place so fixed, and the subsequent proceedings shall be the same as in other cases under this Part.



him to elect to be tried by a Judge without a jury, he is not, upon bill found and arraignment thereon, entitled as of right to ask to be allowed to elect to be tried without a jury. If that is not the effect of the legislation, it places it in the power of the accused not merely to postpone his trial, but to render futile all that has been done by the grand jury, and necessitate a compliance with all the forms prescribed by sec. 827 of the Code, including the preparation and preferring by the prosecuting officer of a charge in accordance with the directions given in sec. 827 (3).

I am unable to think that it was the intention to give an accused person the general right to elect to be tried without a jury. On the contrary, I think that the intention was to give it only in cases in which the exercise of such an election would or might effect a speedy trial of an accused person, and thereby save the delay which waiting for a trial by jury might involve.

And I do not think the legislation extends the right beyond that point.

I agree that the first question should be answered in the affirmative and the second and third in the negative, and that the conviction should stand.

MACLAREN, J.A.:—The accused in this case was tried at the General Sessions of the County of Norfolk before Robb, County Court Judge, and a jury, and was convicted of keeping a disorderly house. He had been committed for trial by a magistrate, but the indictment on which he was convicted was not preferred by the person bound over to prosecute, but by the County Crown Attorney, with the written consent of the trial Judge, under sec. 873 of the Criminal Code. After a true bill had been found by the grand jury, and before arraignment or plea, the prisoner desired to elect to be tried before the County Court Judge without a jury, under the Speedy Trials Act (Part XVIII. of the Criminal Code). On its being held that he was not entitled so to elect, he pleaded “not guilty.” At the close of the trial, the Judge, on the application of the prisoner’s counsel, reserved for this Court the following questions:—

1. Was there any valid evidence that the prisoner was the keeper of a disorderly house?

2. Was my charge erroneous as regards the reference made therein to the woman who had been previously convicted?

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3. Was the prisoner, in the circumstances above stated, entitled to make an election for speedy trial?

As to the first question, I am of opinion that there was ample evidence, if believed by the jury, to prove that the house in question was a disorderly house, and that he was the keeper. The house belonged to him and also the furniture, and he used it when working the farm with which it was connected, which was some two or three miles from his homestead. The evidence points strongly to his having been a joint occupant or keeper with the woman said to have been convicted in October, 1910, and to his being the sole keeper after that time, the house being occupied from time to time by disreputable women. The house retained the same character and reputation after October, 1910, as before; and the admissions made by the witness who did the chores about the house for the prisoner—and made very reluctantly—are quite sufficient alone to justify the conviction. This question should be answered in the affirmative.

As to the second question, what the trial Judge said in his charge on the subject was this: "It has been suggested that the woman who has been already convicted was the keeper; but I think that we have nothing to do with that in this case. I think that, no matter whether she was convicted or not, you have got to try this case upon the evidence that has been presented before you; and, if you come to the conclusion that the prisoner is the keeper or was at any time the keeper of this house, you should find him guilty, giving him, of course, the benefit of any doubt that you may have." I fail to see on what grounds the prisoner could properly complain of this charge. This question should, in my opinion, be answered in the negative.

The third question should also, in my opinion, be answered in the negative. Part XVIII. of the Criminal Code (secs. 822 to 842 inclusive), relating to "Speedy Trials of Indictable Offences," has reference exclusively to prosecutions based upon an information or complaint and a preliminary examination before a magistrate. It is true that there was in this case a preliminary examination before a magistrate, and the prisoner was committed for trial. But this was not followed up by an indictment based upon the charge for which he was committed, "or for any charge founded upon the facts or evidence disclosed on the depositions



taken before the Justice," as might have been done under the provisions of sec. 871 of the Criminal Code. It does not appear from the reserved case whether or not the complainant before the magistrate was present at the Sessions; but, whether or not, the County Crown Attorney might prefer an indictment for the charge upon which the prisoner was committed or for any charge founded on the facts or evidence disclosed in the depositions: Criminal Code, sec. 872. The Deputy Attorney-General informed us at the argument that his instructions were, that no one was bound over to prosecute, although the reserved case would lead one to infer that some one had been so bound; but, in my opinion, in the circumstances of this case, this was quite immaterial.

The fact is, that the depositions and the committal were both ignored, and were not followed by the person bound over to prosecute, if there was such a person, or by the County Crown Attorney. Instead of this, the County Crown Attorney, under sec. 873, obtained the written consent of the Judge to prefer the indictment set out in the reserved case, on which a true bill was returned by the grand jury, and on which the petty jury returned a verdict of "guilty." The depositions taken before the magistrate were not made a part of the reserved case, and counsel for the prisoner did not, before us, ask or even suggest that they should be made a part of it. In the circumstances, we must, I think, assume that the charge in the indictment is not the same as that for which the prisoner was committed, or any other charge appearing in the evidence before the magistrate, as, in either of these events, the County Crown Attorney would not, under sec. 871, have needed the consent of the Judge to prefer the indictment.

It is quite clear from sec. 825 and the succeeding sections of the Code that a speedy trial before a Judge can be had only upon a charge on which the magistrate has committed the accused, or upon one which appears in the evidence before him. As said by Wurtele, J., in *The King v. Wener*, 6 Can. Crim. Cas. 406, at p. 413: "The Criminal Code does not prescribe that an accused can elect to be tried without a jury when, without a preliminary inquiry or without a committal or an admission to bail, and subsequent custody for trial, a bill of indictment has been preferred by the Attorney-General or by any one by his direction, or with the written consent of a Judge of a Court of criminal jurisdiction,

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or by order of such Court, and thus remove the prosecution from the forum to which it properly belongs to another to which jurisdiction has not in such case been given by law. In the absence of any statutory provisions or statutory authority an accused has no right in such a case to demand and obtain a trial in any other Court than the one in which the indictment was found, and which has jurisdiction over the case, and is seized with it."

As stated above, the indictment in this case did not originate with and is not based upon a charge or depositions taken before a magistrate, but is based solely upon the written consent given by the trial Judge, and the Code does not provide for a trial before a Judge without a jury in such a case.

. But, even if the indictment had been based upon a charge for which the accused had been committed or which appeared in the depositions, I am of opinion that he should have elected before the true bill was found by the grand jury. I agree with what is said by Wurtele, J., in the *Wener* case, at the page above cited. He there says: "If no election has been made before an indictment is returned founded on the facts or evidence disclosed by the depositions taken at the preliminary inquiry, the accused has no statutory right to demand a trial before a Judge of Sessions without a jury, and avoid a trial on the indictment." In another case of *The King v. Komienksy*, in the same volume, at p. 528, the same Judge says: "On the finding of true bills, the Court is finally seized with the prosecution, and exclusive jurisdiction over them is vested in the Court, which is the only competent forum or tribunal to carry them in due course and in the ordinary way to their final stage of either conviction or acquittal by the petty jury." On the other hand, in a Manitoba case, *Rex v. Thompson* (1908), 17 Man. L.R. 608, it was held by Howell, C.J.A., that a prisoner may elect up to the time of pleading. I can find nothing in the Code to justify this position, and, in my opinion, it is quite contrary to the genius and spirit of the Speedy Trials Act (now Part XVIII. of the Code). I am of opinion that the correct doctrine is that laid down as above by Wurtele, J. To hold otherwise would be to defeat the very object and purpose of the legislation, and the title of "Speedy Trials" would become a veritable misnomer, and provisions that were designed and en-

acted to speed trials would be converted into machinery to retard and delay.

But there is also, in addition, another difficulty in the way of the prisoner. Having been bound over under sec. 696, and being under bail, if he desired to elect, he should have given the notice of such desire to the Sheriff, as required by sub-sec. 6, added to sec. 825 of the Code by the amending Act of 1909, 8 & 9 Edw. VII. ch. 9. This he did not do, so that he did not take the first step to secure such right. It may be said that this objection is a technical one. But, if the prisoner is claiming a privilege so much at variance with the spirit and object of the legislation, he should at least shew some compliance with the plain provisions laid down in the legislation.

For these reasons, and especially on the ground first set forth, which, in my judgment, is quite sufficient, I am of opinion that the third question should be answered in the negative.

MAGEE, J.A.:—Reserved case stated by the Chairman of the General Sessions of the Peace for the County of Norfolk.

The accused, Wilbert Sovereign, was indicted before that Court in December, 1911, for that he, on the 23rd day of July, 1911, and on other days and times before that date, did keep a disorderly house, that is to say, a common bawdy house, contrary to secs. 228 and 225 of the Criminal Code. The jury found him "guilty."

Under sec. 228, this is an indictable offence. There is no limitation of time for the commencement of a prosecution for it. Consequently, it was open to adduce evidence such as was given, going as far back as May, 1910. It was objected that such evidence was inadmissible, because, under sec. 1142, in the case of an offence punishable upon summary conviction, the complaint must be made or information laid within six months, and under sec. 774 (amended by 8 & 9 Edw. VII. ch. 9) a "magistrate," as defined in sec. 771, could, without the assent of the accused, summarily try a person charged with keeping a disorderly house. But Part XVI., which includes sec. 774, relates to indictable offences, and not to offences punishable under summary convictions, which are dealt with by Part XV. The only provisions of the Code under which the keeper of a disorderly house or bawdy house can

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be punished by summary conviction are secs. 238 and 239, the former of which declares every one who is the keeper of such a house to be "a loose, idle or disorderly person or vagrant;" and sec. 239 makes "a loose, idle or disorderly person or vagrant" liable to fine or imprisonment or both. But that punishment is not for keeping the house, it is for being "a loose, idle or disorderly person or vagrant." In *The Queen v. Stafford* (1898), 1 Can. Crim. Cas. 239, although the charge was for being "the keeper of a common bawdy house," it is evident that the proceedings must have been taken under the sections then corresponding to secs. 238 and 239, and the imprisonment was held to be unauthorised by them. As the offence here charged is punishable only by indictment, sec. 1142 does not apply.

It was shewn that the defendant was the owner of the house in question, which was situate on a parcel of 45 acres of land owned by him. He resided about two and a half miles away. The house was "formerly occupied" by one Mrs. Denby. There is some reference to the fact of her having been arrested and convicted, but for what does not appear. Presumably it was for keeping this disorderly house. She left in October, 1910. During her occupancy, there is evidence of other women being there at various times, and men, and of the evil reputation of the house, and of instances of prostitution by inmates, and of lewd conduct by this defendant with Mrs. Denby and another woman, and of his having been "hundreds of times" in the bed-room with the former, and of his having invited there one witness who was there several times, and says the house was one of ill-fame, and that this defendant and Mrs. Denby were the keepers—the people who were running the house. As to this, the witness was hardly cross-examined. This was clearly "some valid evidence" to shew that the defendant was a keeper of a common bawdy house, under sec. 228.

Since October, 1910, the house, though furnished by the defendant, has been vacant, unless when he occasionally stopped there. The presence of one or two women there on three occasions, weeks apart, is shewn, but not the time of day, except once at night, nor the length of their stay. Both of them had been there in Mrs. Denby's time. There is no evidence of any improper conduct or of other men being there. There is not,



I think, sufficient proof of the existence of a common bawdy house there during this period.

In his charge to the jury, the learned Chairman, after pointing out that the defendant was the owner of the house, said: "It had been suggested, however, that the woman who had already been convicted was the keeper; but I think that we have nothing to do with that in this case. I think that, no matter whether she was convicted or not, you have got to try this case upon the evidence that has been presented before you." I am at a loss to discover any objection to this, or indeed why the learned Chairman was indulgent enough to reserve any question upon it.

Another question remains as to the right of the Court to try the defendant. The statement of the case sets out these facts: "The prisoner had been committed for trial after the preliminary hearing, and admitted to bail, and appeared, as provided by his recognizances, for trial at the above-named General Sessions of the Peace. The bill of indictment was, however, not preferred by the person bound over to prosecute, but was preferred under directions given by the trial Judge, as provided by sec. 873 of the Criminal Code. Before arraignment or plea, the prisoner desired to elect trial by the County Court Judge, but it was held that he was not entitled, under the circumstances, so to elect." I assume that the information laid, the preliminary hearing had, and the defendant's recognizance to appear for trial, were all upon the same charge as the indictment.

It is only under sub-secs. 6 and 7 of sec. 825 of the Criminal Code, 1906, as added in 1909 by 8 & 9 Edw. VII. ch. 9, that the defendant, being not in custody but under bail, could have claimed any right to a trial before a Judge without a jury. Previously, he would have had to be in actual custody either upon the original commitment for trial by the magistrate holding the preliminary inquiry, or by virtue of a surrender into custody after bail, or "otherwise in custody awaiting trial on the charge."

The new sub-section (6) provides that a person accused who has been bound over by a Justice under sec. 696 (*i.e.*, to appear for trial), and is at large under bail, may notify the Sheriff that he desires to make his election under Part XVIII. (relating to Speedy Trials), and thereupon the Sheriff shall notify the Judge; and, by sub-sec. 7, the Judge having fixed the time and place for the

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accused to make his election, the Sheriff shall notify the accused thereof, and the accused shall attend, and the subsequent proceedings shall be as in other cases under Part XVIII.; and, by sub-sec. 8, the recognizance taken when the accused was bound over shall be obligatory with reference to his appearance at the time and place so fixed, and to the trial and proceedings thereupon, as if originally entered into with reference thereto.

No time is specified for the giving of the notice to the Sheriff. If a notice were given in such a case, it would be material to consider at what time an election may be made by those in custody. The original Act providing for trials by a Judge without a jury, 32 & 33 Vict. (1869) ch. 35, was intituled "An Act for the more speedy trial in certain cases of persons charged," etc.—afterwards called the Speedy Trials Act—and this might give some colour to the idea that where the trial would not be speeded the Act was not intended to apply. But, excepting in the title, there was nothing in the wording of the Act itself so to indicate, except possibly the provisions that the prisoner might with his own consent be tried "out of Sessions," and that the Judge was to tell him that he had the option to "remain untried until the next sittings" of the Court of General Sessions of Oyer and Terminer. These words did not, in fact, I think, imply that the speedy trial must be before the session of the jury Court began—but subsequent amendments removed any possibility of such a construction. It must, I think, be taken that the object of speedy trials indicated by the title was to be attained by the creation of a new tribunal—a Court of record—which would not be limited to half-yearly or other periodical sittings, but could sit at any time, and that tribunal being created (see Ontario statute of 1873, 36 Vict. ch. 8, secs. 357, 358), the positive directions to the Sheriff and the Judge as to their duties towards prisoners, in effect, gave each prisoner to whom the Act applied an option and right of election as to which one of the tribunals he would be tried by, or rather the right to have an opportunity to say he chose trial by the Judge. I do not think it would have been any answer to a claim to exercise such right to say to the prisoner, "The jury Court is now sitting, and your trial there can take place to-day, or sooner than if you are to be tried by the Judge alone." It is now expressly declared in sec. 825 that the trial by the Judge shall be had whether



the jury Court or the grand jury thereof is or is not then in session—and I agree with the opinion of Howell, C.J.A., in *Rex v. Thompson*, 17 Man. L.R. 608, that this provision is not restricted to the trial itself.

Then, by sec. 828, even after a prisoner has elected to be tried by a jury, he may notify the Sheriff that he desires to re-elect, and this at any time before his trial has commenced, and whether an indictment has been preferred against him or not—unless the Judge is of opinion that it would not be in the interest of justice to allow a second election; and, if an indictment has been actually preferred, the consent of the prosecuting officer must be obtained.

In cases where, under Part XVI. or XVII., the prisoner had elected before the committing magistrate not to be tried by him, but by a jury, he may, under sec. 830, notify the Sheriff, before the sitting of the jury Court, that he desires to re-elect.

The Code, therefore, gives three periods for the election by an actual prisoner as of right—before the sitting, before the preferment of the bill, and before the trial has commenced. It would be difficult to say which of these should apply to the case of an accused person who is at large under bail; but I think it is clear that his notification to the Sheriff must be taken as the foundation of his right to put himself in the position of a prisoner as one entitled to be called upon to elect. That he was not in actual custody merely by reason of appearing, “as provided by his recognizance,” is manifest from sec. 1092, which declares that a recognizance is not discharged by arraignment or conviction.

This defendant did not give any such notice, so far as appears; but, at the last moment, when called upon to answer to the indictment, said that he desired to elect. Without being in custody and without having given the notice to the Sheriff, he had not put himself in the position to claim that right. It appears that the Chairman of the Court of General Sessions held “that he was not entitled under the circumstances” so to elect. Therein the Chairman was right, as no notification had been given.

The defendant then pleaded to the indictment, or a plea must have been entered for him, as the trial proceeded, and he was by the jury found “guilty.” There is nothing to indicate that any other result might have been arrived at if the Chairman had been

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trying the case without a jury, and there is no reason to suppose that there was any failure of justice through the defendant's omission.

I would answer the first question in the affirmative, the second and third in the negative.

GARROW, J.A., and LATCHFORD, J., concurred.

*Conviction affirmed.*

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## [IN THE COURT OF APPEAL.]

RE VILLAGE OF BRUSSELS AND MCKILLOP MUNICIPAL  
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## RE VILLAGE OF BLYTH AND TOWNSHIP OF MCKILLOP.

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*Ontario Railway and Municipal Board—Jurisdiction—Separate Telephone Systems in Adjacent Territories—Order for Connection and Intercommunication and Construction and Operation of Switch-board and Trunk Line—Ontario Telephone Act, 1910—Agreement with Bell Telephone Company Approved by Board—Applications to Board—Parties—Township Corporation—"Municipal Telephone System"—Power of one Member of Board to Make Order.*

The Corporation of the Village of Brussels applied to the Ontario Railway and Municipal Board for an order compelling "The McKillop Municipal Telephone System" to establish connection, intercommunication, joint operation, reciprocal use, and transmission of business between the applicants' and the respondents' telephone systems; and the Board made an order accordingly, and by a subsequent order refused to rescind it; from which orders the township corporation, representing the subscribers to the township telephone system, appealed. The first order required the appellants to build and operate a switch-board and a trunk telephone line. It appeared that the appellants were operating under an agreement made between them and the Bell Telephone Company, substantially for the purposes recognised and authorised by sec. 8 of the Ontario Telephone Act, 1910, which agreement had been approved by the Board prior to the application made by the village corporation:—

*Held*, that the result of obedience to the order appealed against would be to alter or vary the relations based upon the agreement with the Bell Telephone Company approved by the Board; and the Board had no jurisdiction to do that, unless upon an application for the purpose with proper parties before it.

*Held*, also, that the order made (involving a large expenditure) was not, even apart from the agreement with the Bell Telephone Company, authorised by any of the provisions of the Act; MACLAREN, J.A., expressing no opinion as to this; and MAGEE, J.A., inclining to the contrary opinion.

*Per* MOSS, C.J.O., and MEREDITH, J.A.:—The application should have been made against the township corporation, not against the "system," which was not a legal entity.

*Per* MEREDITH, J.A.:—There was no power in one member of the Board to hear the application and make the order; and the Bell Telephone Company should have been given an opportunity to be heard upon the application.

Orders of the Board set aside for want of jurisdiction.

An order of similar purport made by the Board upon the application of the Corporation of the Village of Blyth was also set aside.

APPEALS in two separate matters from orders of the Ontario Railway and Municipal Board.

The first appeal was by the McKillop Municipal Telephone System from two orders made by the Board.

The first order was made on the 10th March, 1911, on the application of the Municipal Corporation of the Village of Brussels, who named as respondents "The McKillop Municipal Telephone System," and was as follows:—

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Upon the application of the said applicants, and upon hearing what was alleged by counsel for the applicants and respondents, and for the Bell Telephone Company of Canada, and the Board having referred this application for consideration and report to its expert, upon consideration of the said expert's report:—

The Board, under and in pursuance of sec. 9 of the Ontario Telephone Act, 1910, orders connection, intercommunication, joint operation, reciprocal use, and transmission of business between the applicants' and respondents' telephone systems or lines.

The Board further orders and directs the applicants to construct, build, and maintain a trunk telephone line from their switch-board in their central office in the village of Brussels, to a point on the gravel road half-way between the village of Brussels and the town of Seaforth.

The Board further orders that the applicants shall bear all the cost of building, constructing, and maintaining the said trunk line, and of equipping and operating the switch-board in the central office in the said village of Brussels, and shall allow the use of the same and of all their lines to the respondents, or any of them, on the basis of a charge of five cents for each call or connection.

And it is further ordered that the respondents shall build, install, maintain, and operate a switch-board in or adjacent to the town of Seaforth, and construct, build, and maintain a trunk telephone line therefrom to the above-mentioned point on the gravel road, half-way between the town of Seaforth and the village of Brussels, being the point up to which the said applicants have been hereinbefore directed to construct their line as aforesaid.

And it is further ordered that the respondents shall bear and pay all the cost of building, constructing, and maintaining the said trunk line, and of equipping and operating the said switch-board in a central office in or adjacent to the said town of Seaforth, and shall allow the use of the same and of all their lines to the applicants, or any of them, on the basis of a charge of five cents for each call or connection.

And it is further ordered that, should any person who is not a subscriber to either the system of the applicants or the respondents, desire to avail himself of the use of the said switch-



board and lines, or any of them, then that a charge of twenty cents shall be made and collected therefor, together with messenger service, if any, which sum or sums shall be paid in to the office from which the call originated, and that the said charge of twenty cents, exclusive of messenger, shall form a common fund, and be divided monthly between the applicants and the respondents, equally, share and share alike.

And it is ordered that the said switch-boards and trunk line shall be built, constructed, and equipped and the connection between the telephone systems and lines of the applicants and respondents shall be made and completed, all within the space of two months from the date of this order.

And it is further ordered that the terms of this order for connection, intercommunication, joint operation, reciprocal use, and transmission of business between the systems of the applicants and respondents may be superseded with the approval of this Board by a mutual agreement in writing to be made by and between the applicants and respondents.

The McKillop Municipal Telephone System applied to the Board to set aside or vary the order of the 10th March, 1911; and that application was dismissed by the Board by order made on the 5th May, 1911. This was the second order appealed against.

The second appeal was by the Municipal Corporation of the Township of McKillop from an order of the Board, dated the 20th June, 1911, made on the application of the Municipal Corporation of the Village of Blyth, naming the township corporation as respondents, for an order directing connection, intercommunication, etc., between the telephone systems of the applicants and the respondents.

The order directed, amongst other things, that the township corporation should build, maintain, and operate a switch-board in or adjacent to the town of Seaforth, in the county of Huron, and should construct, build, and maintain a trunk line from the town of Clinton on the main gravel road between that town and the village of Blyth to a point on the road distant two and one-half miles north of the town of Clinton, being the point up to which the village corporation were also ordered and directed to construct their portion of the line. The township corporation

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were also ordered to pay all the cost of building, constructing, and maintaining the trunk line and of equipping a switch-board and a central office in or adjacent to the town of Seaforth, and to allow the use of the same and of all their lines to the village corporation or any of their subscribers, on payment of a charge of five cents for each call or connection.

November 21 and 22, 1911. The appeals were heard by Moss, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, J.J.A.

*M. K. Cowan*, K.C., and *R. S. Hays*, for the appellants. The orders appealed from should be varied or rescinded. The appellants are operating municipal telephone systems under the provisions of the Local Municipal Telephone Act, 8 Edw. VII. ch. 49, but have no switch-board of their own, their switching being done by the Bell Telephone Company, under an agreement approved by the Ontario Railway and Municipal Board, in accordance with the provisions of sec. 10 of the Ontario Telephone Act, 1910. By the terms and conditions of the orders appealed from, the appellants' systems will be required to terminate their agreements and connections with the Bell Telephone Company, and so lose the rights and benefits they now enjoy, as well as being saddled with great additional expense. We submit that, under sec. 6 of 6 Edw. VII. ch. 31, the hearing of this case on the 24th February, 1911, in the presence of only one member of the Board, was irregular and illegal, and that the Board had no power or authority to make any order based upon such a hearing. The facts adduced do not disclose the necessity of an order as asked for by the respondents. The provisions of sec. 9 of the Act of 1910 are not intended to be imperative, requiring the Board to make an order in every case applied for. If the phraseology of that section appears to be imperative, its spirit is discretionary. Such discretion is a judicial and not an arbitrary one. We further submit that the Board has no jurisdiction whatever to make or to enforce the carrying out of the orders appealed from; and, moreover, the appellants have no power or authority to raise further moneys for the purpose of reconstructing the systems in compliance with the orders of the Board. The appellants' systems are not complete systems, having each one central switch-board and main trunk lines running therefrom, within the meaning of secs. 8 and 9 of the Act of 1910.



*H. D. Gamble, K.C.*, for the respondents the Corporation of the Village of Blyth. The orders appealed from are right, and should be affirmed. They do not interfere with any agreement between the Bell Telephone Company and the appellants. See the Ontario Railway and Municipal Board Act, 1906, sec. 17, sub-secs. 2 and 3. Moreover, the appellants do not of necessity lose connection with adjacent townships, and they may agree to connect their system with that of such townships, under sec. 8 of the Act of 1910, or, in case of refusal, connection may be ordered by the Board under sec. 9 of the same Act. The language of the Act of 1910, sec. 9, is imperative; and the Railway Board has no option in the matter of ordering connection; but the terms and conditions upon which such connection is brought about are in the sole discretion of the Board. Nothing turns upon the fact that the agreement between the Bell Telephone Company and the appellants was ratified by the Board, when it is observed that, by the order ratifying, the Board reserves the right to rescind or vary it in any way they may desire. The question of expense of building and maintaining the necessary switch-board and other appliances for connection between the appellants' and respondents' systems, be the expense much or little, does not give any right to appeal. This expense is only a question of fact, part of the terms and conditions imposed upon the appellants, and the Board's decision upon all matters of fact is final and conclusive. See sec. 41, sub-sec. 3, of the Ontario Railway and Municipal Board Act, 1906. As to the proceedings before the Board on the 24th February, 1910, we submit that the appellants have no cause of complaint, because, after the order had been made, a rehearing of the application was granted them, whereat the whole evidence was gone over, and every opportunity was given the appellants to present their case fully. As to the objection that there is no authority in the statute by which the expense of installing the necessary equipment may be provided for in order to comply with the order of the Board, we submit that under sec. 11, sub-sec. 1b, and sec. 13, sub-sec. 6, of the Act of 1908, the appellants may pass the necessary supplementary by-law and levy the cost upon the subscribers; but, if these sections do not confer the right, then the order of the Board carries with it the necessary authority to raise the money, and the Board may, under sec. 20 of the

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Ontario Railway and Municipal Board Act, 1906, build the appellants' portion of the line, construct and establish the necessary switch-boards to complete the connection, and assess the amount against the appellants; and, what the Board may do for the appellants, they may do themselves.

*W. M. Sinclair*, for the respondents the Corporation of the Village of Brussels. The arguments advanced on behalf of Blyth apply with equal force to the Brussels case. As to the jurisdiction of the Board, see sec. 30 of the Ontario Railway and Municipal Board Act, 1906, and sub-sec. 3 of sec. 11 of the Local Municipal Telephone Act, 1908. Section 43 of the Ontario Railway and Municipal Board Act, 1906, does not allow appeals on questions of fact; and, therefore, the appellants have no right to be here.

*Hays*, in reply.

March 6, 1912. Moss, C.J.O.:—These are appeals from orders or decisions pronounced by the Ontario Railway and Municipal Board. So far as the respondents to the appeals are concerned, the matters are separate and distinct; but substantially the same questions are involved; and the appeals, which were heard during the same sittings of the Court, may be conveniently dealt with together.

The first two in point of time of the orders complained of were pronounced upon an application made by the Corporation of Brussels, on which they named as respondents "The McKillop Municipal Telephone System." This was not a proper proceeding. While it seems that there is an association of individual subscribers who for convenience act under that name, it does not appear that there is any corporate body or company known to the law capable of responding by that name to the application made by Brussels to the Board for the orders now in question. Having been constructed and installed in 1908, under the provisions of the Local Municipal Telephone Act, 1908, the system and all works and property acquired, erected, or used in connection therewith, became vested in the Municipality of McKillop in trust for the benefit of the subscribers. The opposition to the application was made through the municipality; but it may be questioned whether, in the form in which the proceedings now stand, the orders made could be effectively enforced, if capable of enforcement under any circumstances.

But more formidable objections appear when the substantial questions between the parties are examined.

The respondents the Corporation of the Village of Brussels, as trustees for the subscribers of the local telephone system known as the Brussels Morris and Grey Telephone System, made application in October, 1910, to the Ontario Railway and Municipal Board for an order for connection, intercommunication, or reciprocal use in the transmission of business between the telephone systems of the respondents and the appellants. The applicants alleged that their system was located in the territory immediately adjacent to the appellants'; and that they had been, for some months previous to their application, desirous of entering into an agreement with the appellants for such connection, intercommunication, or reciprocal use; but the latter had declined to do so. Apparently, the application was based upon sec. 9\* of the Ontario Telephone Act, 1910—10 Edw. VII. ch. 84—which seems to be the only enactment that affords any warrant for the application.

It is very difficult, however, to give any intelligible meaning to the language of the section. Read literally, it does not comprehend this case; on the contrary, it would seem to be providing for some case of a company or person, as defined by sec. 2 (c)† of the Act, having two or more systems or lines "located in territory adjacent to each other." Doubtless, this was not the intention; but, in the present form of the section, the real intention is not clearly expressed. The order of the Board dated the 10th March, 1911, which directs connection, intercommunication, joint operation, reciprocal use, and transmission of business, purports to be made in pursuance of sec. 9; but, as pointed out above,

\*9. Wherever the telephone systems or lines of any company or person are located in territory adjacent to each other and in the event of any company or person owning, controlling, or operating one or more of the said telephone systems, refusing or neglecting to enter into an agreement for any or all of the purposes mentioned in the next preceding section, the Board shall issue an order providing for such connection, intercommunication, joint occupation, reciprocal use, or transmission of business upon such terms and conditions as it may deem advisable.

† 2. (c) "Company or Person" shall mean any Company, Corporation, Municipal Corporation, Association, individual or aggregation of individuals owning, controlling, or operating a telephone system or lines within the Province of Ontario, and not within the legislative authority of the Parliament of Canada.

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that section is halting and uncertain in expression; and, in strictness, it does not confer jurisdiction in this particular case.

There still remains the question of jurisdiction dependent upon the existence of an agreement between the appellants and the Bell Telephone Company, substantially for the purposes recognised and authorised by sec. 8\* of the Ontario Telephone Act, 1910, and which had been approved of by the Board prior to the application by Brussels.

The appellants and the Bell Telephone Company were working under this agreement when the orders now in question were made by the Board. It is said that there was no intention to interfere with that agreement, and that there is in fact no interference with it.

But it is obvious that compliance with the order by the appellants does seriously alter their relations with the Bell Telephone Company. It exposes them to the consequences of a breach of the agreement, and may deprive them of the benefits and advantages which they now enjoy under it. And, while the agreement remains as an existing agreement sanctioned and approved by the Board, the Bell Telephone Company are entitled to assert their rights under it and to claim that they should remain undisturbed and unaffected as long as the agreement stands. The Board has undoubted power to rescind the order for good cause, but the jurisdiction to do so should be exercised only upon a properly framed application for that purpose, to which all those who are interested are parties or of which they are properly notified.

At present, the agreement is a valid subsisting agreement; and, while, upon an application regularly framed and constituted as to parties, the Board may determine its true meaning, yet while it stands the Board is without power or jurisdiction to alter or vary it.

\* 8. Subject to the approval of the Board every company or person shall have power to enter into any agreement or agreements with any other company or person for the purpose of providing for connection, intercommunication, joint operation, reciprocal use, or transmission of business as between the respective systems controlled, owned or operated by such companies or persons, and may make such arrangements as shall be deemed advisable for the proper apportionment of expenditures and commissions, the division of receipts and profits, or such other adjustments as may be necessary under any such agreement.



And the important question is, whether the Board has, in the present state of the legislation, any power or jurisdiction to order the performance of work of construction and connection with the Brussels system, involving the expenditure of money upon capital account by the subscribers to the appellants' system. There are no express provisions covering such a case; and the different sections to which we were referred by counsel for the respondents fall far short of supplying the necessary machinery for imposing or collecting funds to meet the outlay which obedience to the orders imposes.

Apart from these latter considerations, however, the want of jurisdiction to deal with the application made on behalf of Brussels, based upon the other grounds referred to, is sufficient reason for allowing the appeal.

There is no difference in substance between the case of Brussels and the case of the application by the Corporation of the Village of Blyth. Except as to the form of the application with respect to the parties respondent, all the objections to the power and jurisdiction of the Board apply with the same force as in the Brussels case. The order complained of in the Blyth case is to the same effect as that pronounced in the Brussels case. The appeal is on the same grounds, and the result should be the same.

Both appeals should be allowed, and the orders complained of be set aside with costs to the appellants in each case.

GARROW, J.A., concurred.

MACLAREN, J.A. (Brussels case):—This is an appeal by the Corporation of the Township of McKillop, representing the subscribers to the municipal telephone system of the township, on leave granted by the Court, from an order of the Ontario Railway and Municipal Board of the 10th March, 1911, ordering the appellants to build and operate a switch-board in or adjacent to the town of Seaforth and a trunk telephone line therefrom to a point half-way between Seaforth and Brussels, there to connect with the Brussels line to that village; and from an order of the said Board of the 5th May, 1911, refusing to vary or rescind the order of the 10th March.

The appellants were organised under sec. 11 of the Local Municipal Telephone Act, 1908, 8 Edw. VII. ch. 49, but have no

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switch-board of their own, their switching being done by the Bell Telephone Company, in Seaforth, under an agreement which was duly approved by the said Board in accordance with the provisions of sec. 10 of the Ontario Telephone Act, 1910, 10 Edw. VII. ch. 84. Section 11 of this Act provides that no company or person owning such a telephone system or lines shall enter into any contract, agreement, or arrangement with any other company having authority to construct or operate a telephone system or line, restricting competition in the supply of such service, unless the same is just and reasonable, and until such contract, agreement, or arrangement has been submitted to and received the assent of the Board.

The said agreement contained a provision that during its continuance the appellants should not connect their telephone system with the system of any company or persons operating in competition with the Bell Telephone Company, and without the consent of the Bell Telephone Company; and it appeared that the applicants in this matter operated in opposition to the Bell Telephone Company, and that the latter refused the appellants the right to connect their system with that of the applicants.

The applicants relied upon a clause in the approval of the Board, to the effect that the right of revoking or varying the order was reserved; but, in my opinion, such reservation does not confer any greater power upon the Board than is found in the Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII. ch. 31, sec. 19 (4), which says that "The Board may review, rescind, change, alter or vary any rule, regulation, order or decision made by it."

By sec. 14 of the Ontario Telephone Act, 1910, it is expressly enacted that the Board shall not have the power "to alter or vary any agreement between a municipal corporation and a company, or between two or more companies or persons." What they cannot do directly, I do not think they can do indirectly or by a side wind, as is attempted by the orders now appealed from.

The agreement between the McKillop telephone subscribers, which must have been found by the Board to have been just and reasonable when they gave it their approval, should stand until, after proper notice to the parties, they have an opportunity of stating their objections to the variance or revocation of such approval. So long as such approval stands unchanged and unre-

voked, I am of opinion that the Board is without jurisdiction to pass such orders as are now in appeal.

I do not consider it necessary at present to consider the other matters argued before us, or to express any opinion as to whether or not the orders in question would be a compliance with the provisions of sec. 9 of the Ontario Telephone Act, 1910, even if the above objection did not exist.

In my opinion, the appeal should be allowed.

(Blyth case.) The same objection applies to the order of the Ontario Railway and Municipal Board in this case as in the Brussels case; and, for the reasons given therein, I am of opinion that the appeal should be allowed and the orders set aside.

MEREDITH, J.A. (Brussels case):—The appellants have a local telephone system which satisfies all their needs; and they are naturally opposed to any action which would disturb that system or the very satisfactory arrangements made between them and the Bell Telephone Company, under which the appellants' lines are operated by the company and under which the subscribers to the appellants' system are also given intercommunication with the company's subscribers; and under which arrangements the appellants are bound not to make connection with any other system.

Upon an application made by the respondents to the Ontario Railway and Municipal Board, which was heard by one member of the Board only, an order was made requiring the appellants to connect their system with that of the respondents, and to give intercommunication between the subscribers of each, and, for that purpose, to build and operate a trunk line and a switchboard—which would, of course, necessitate providing also a room, light, and heat sufficient for the purpose. The order, if obeyed, would compel the appellants to break their agreement with the Bell Telephone Company and put an end to all their rights and benefits under it, obliging them to operate their own lines at very considerable continued expense, in addition to the very considerable expense of doing the work ordered to be done by them; entirely reversing their policy in the operation of their lines and making the operation much more costly, as well as depriving them of the benefits of intercommunication with the Bell Telephone Company's subscribers; unless, indeed, that

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company should see fit to make some other agreement with them, which neither they nor the Board would give any power to compel.

If the Board had the power to do this injustice, the appellants must submit to it, as well as must the Bell Telephone Company, for in that case there would be no right of appeal; but, if the Board had no such power, this Court can and must relieve the appellants from it: and the power to make such an order ought to be made to appear with very reasonable clearness to be upheld in this Court; but I am unable to find, in all the legislation upon the subject, sufficient authority to support it.

The first question that strikes the mind, in dealing with the case, is: where is the money to come from which must be expended in obeying the order? And it must be borne in mind that, if the power exist, there is no limit of the amount which the Board may thus require to be expended; it may be little in one case, but it may be very great in another, and that quite apart from any damages any one might be compelled to pay for breach of contract such as that involved in this case. I have been unable to find any source from which the money which must be paid out, if the order in appeal is complied with, is to come; and I cannot help thinking that, if the subscribers to such systems could be so made personally liable, they might go a long time without the advantages of a telephone rather than run the risk of being burdened with the cost of doing that which is altogether against their wishes, and that which they believe to be their best interests, upsetting their whole plan of operation, compelling a breach of their contract, with whatever consequences might follow from it, as well as requiring them to do that which they have carefully provided against—operate their own system. The cost of constructing and maintaining a system is to be paid by the “initiating municipality,” and may be recovered from the subscribers in the manner provided for in the enactments; but such “cost” must, I think, under the words of the enactment, as well as the reasonableness of the thing, be limited to the construction and maintenance of the system as contemplated and desired by the subscribers, and which they have petitioned the municipality to undertake for them, and not a different system which they do

not desire, but which some other system endeavours to force upon them; and, of course, there is no warrant for compelling the municipality to pay without recoupment.

It may very well be that the Board would have power to order connection and intercommunication where the applicants were willing to pay the cost of making the connection and where it could be done without inflicting upon any party such injustice as the appellants reasonably complain of in this case. I can find no sufficient authority for an order which has the effect of the order made in this case; nor is there any need for it.

There is no good reason why the respondents should not make arrangements with the Bell Telephone Company similar to those made by the appellants with that company, arrangements which evidently could be made at much less cost and which would not only give the respondents all they sought in this application, but also intercommunication with the company's subscribers as well; but that they would not, because, I have no doubt, of some feeling against, and concerted opposition to, that company, to give effect to which the appellants are to be driven from their alliance with it, and compelled, at great cost, to establish switching stations and operate their own lines, as well as to lose the benefit of intercommunication over the Bell system, and take the consequences of a breach of the agreement with the company.

For two other reasons, I am also of opinion that the order cannot stand: (1) there was no power in one member of the Board to hear the application and make the order; and (2) the application should have been made against the municipality, not against the "system," which is not a legal entity: and there is still another reason, which I shall mention in dealing with the like case of Blyth and McKillop.

The order should, I think, be rescinded for want of jurisdiction.

(Blyth case.) This case is quite the same as the Brussels case, in which I have just expressed my opinion, except in these respects: (1) the initiating municipality is properly proceeded against; and (2) the application was heard, and the order made, by the full Board: and, therefore, all that I have said in the other case, except in these respects, applies fully to this case: but I

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desire to add a few observations now, applicable alike to each case.

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The Bell Telephone Company are materially affected by the order; and, according to first principles in the administration of justice, ought to have been given an opportunity of being heard upon the application: they might have desired to oppose it upon the merits, if the Board had jurisdiction: and they might also have desired to contend, and possibly might have been able to convince the Board, that the order sought would be one substantially affecting rights in them, over which, not being a provincial corporation, the Board had no power: see sec. 2 (c) of the Ontario Telephone Act, 1910.

This appeal should, therefore, be dealt with in the same manner as the other.

MAGEE, J.A.:—Looking at the provision for extensions in secs. 5, 7, and 11 of the Local Municipal Telephone Act, 1908, and the provisions for connection and switch-boards in secs. 10 and 11, and the amendments in 1910 and 1911 by 10 Edw. VII. ch. 92, secs. 1 and 4, and 1 Geo. V. ch. 56, sec. 2 (13 *a.*, (5), (6)), I am inclined to think the council would be entitled to collect from the subscribers the additional cost imposed upon it by law. It would appear to be one of the risks run by those who invoke for their private convenience the authority of the municipality to use the highways for the poles and lines, and break, dig, and trench the same, or private property, that they may be called upon to submit to more extension and expense and a wider connection than they originally contemplated. As the municipality is, under sec. 10, authorised to enter into agreements for connection with other systems, I would think that, under sec. 4 of the Ontario Telephone Act, 1910, the Board would have power to order it to do so.

But, for the other reasons stated by my Lord the Chief Justice, I agree that the appeals should be allowed.

*Appeals allowed.*



## [DIVISIONAL COURT.]

## RICE v. GALBRAITH

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*Principal and Agent—Agent's Commission on Sale of Land—Employment of Agent to Find Purchaser—Vendor and Purchaser Brought together by Intervention of Agent—Sale Effected by Vendor without Knowledge of Agent's Introduction of Purchaser.*

Where the defendant employed the plaintiffs, who were brokers, to sell his property, and imposed no time-limit, and never revoked their authority to find a purchaser, and the plaintiffs brought the property to the notice of one who became the purchaser, though the negotiations were not conducted by the plaintiffs, and the defendant, when he closed the transaction, did not know that the plaintiffs had brought the property to the notice of the purchaser:—

*Held*, that the plaintiffs were entitled to a commission upon the sale-price. Review of the authorities.

*Wilkinson v. Alston* (1879), 48 L.J.Q.B. 733, applied and followed.

*Locators v. Clough* (1908), 17 Man. L.R. 659, disapproved.

Judgment of DENTON, Jun. Co. C.J., York, reversed.

APPEAL by the plaintiffs from the judgment of DENTON, Jun. Co. C.J., dismissing an action in the County Court of the County of York for commission on the sale-price of the defendant's land, upon a sale brought about by the efforts of the plaintiffs as the defendant's agents for sale, as they alleged.

February 16. The appeal was heard by a Divisional Court composed of CLUTE, LATCHFORD, and SUTHERLAND, JJ.

G. H. Kilmer, K.C., for the plaintiffs. In the Court below the case was decided in favour of the defendant, on the ground that he did not know, when he sold to the purchaser, that she was the plaintiffs' client. Assuming the facts, which are not open to dispute, that the defendant employed the plaintiffs to sell the property, and that the plaintiffs brought it to the notice of the purchaser, their right to the commission is established, and is not affected by the fact that, when the defendant sold the property, he did not know that the purchaser was the client of the plaintiffs: *Sager v. Sheffer* (1911), 2 O.W.N. 671, and the case there cited of *Wilkinson v. Alston* (1879), 48 L.J.Q.B. 733; *Burchell v. Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614. The learned trial Judge relied on the case of *Locators v. Clough* (1908), 17 Man. L.R. 659; but it is submitted that the authorities above cited should be followed in preference to the Manitoba case.

J. J. Maclellan, for the defendant, argued that the Manitoba case was absolutely in point, and should be followed. The agent,

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in order to be entitled to a commission, must do more than merely say that certain premises are for sale—he must be the efficient cause, the *causa causans*, of the transaction: *Burchell v. Gowrie and Blockhouse Collieries Limited*, *supra*, in which case the agent was an active intermediary, and did more than merely introduce the purchaser. *Locators v. Clough*, *supra*, was an unanimous judgment of the Manitoba Court of Appeal, and shews that the *onus* is on the plaintiffs to shew that but for their intervention the sale would not have taken place. He also referred to *Stratton v. Vachon* (1911), 44 S.C.R. 395, *per* Duff, J., at p. 406, where he refers to Lord Atkinson's judgment in the *Burchell* case, at p. 624. [SUTHERLAND, J., referred to *Singer v. Russell* (1912), 25 O.L.R. 444.]

*Kilmer*, in reply, argued that the plaintiffs had rendered valuable service to the defendant in connection with the sale, and referred particularly to the judgment of Cotton, L.J., in the *Wilkinson* case, at p. 736.

March 8. CLUTE, J.:—The action is for a commission on the sale of land. The defendant listed the property with the plaintiffs, real estate brokers, in Toronto, for sale. It is clearly established that the plaintiffs brought the property to the notice of Mrs. Rough, who subsequently became the purchaser. The house was examined by her at the instance of the plaintiffs. Mrs. Rough is under the impression that her attention was first brought to the house at the instance of her brother-in-law, Mr. Blackie; but in this, I think, she is mistaken; and the Judge, while not deciding the point, seemed also inclined to that view.

Subsequently, another brother-in-law of hers got in communication with one of the builders, and so with the defendant, Galbraith, and, acting for Mrs. Rough, finally agreed upon the purchase-price, which was \$100 less than the defendant had instructed the plaintiffs to accept.

Upon the evidence, there can be no reasonable doubt that it was through the action of the plaintiffs that the defendant got in communication with the purchaser; and so I think it may be fairly found upon the evidence that the sale would not have been brought about but for the action of the plaintiffs. But it is said, and the judgment below proceeds upon this sole ground, that the sale was in fact made by the defendant without knowing

at the time that the attention of the purchaser had been brought to the premises by the plaintiffs. Upon this ground the trial Judge found for the defendant, following *Locators v. Clough*, 17 Man. L.R. 659. The judgment is by the Court of Appeal. Phippen, J.A., by whom the judgment of the Court was given, says: "I have no doubt that had the defendant sold with knowledge that the property had been introduced to Forrest by the plaintiffs, he would be liable for some commission. I cannot, however, hold that the mere introduction of the property to Forrest without endeavouring to negotiate or in fact negotiating a sale is itself an earning of the agreed commission, the owner effecting a sale on terms less favourable than those expressed in the commission contract, in ignorance of the plaintiffs' action and under circumstances which did not place him upon inquiry."

I do not take this to be the law. A number of the cases bearing upon this point are referred to in *Sager v. Sheffer*, 2 O.W.N. 671. It has been held sufficient in most cases that the agent has been instrumental in bringing the purchaser and vendor together, although the negotiations are subsequently conducted exclusively by the parties. "If the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission although the actual sale has not been effected by him:" *Green v. Bartlett* (1863), 14 C.B. N.S. 681, 685; *Steere v. Smith* (1885), 2 Times L.R. 131. "It is sufficient if the purchaser becomes such through the agent's intervention:" *Mansell v. Clements* (1874), L.R. 9 C.P. 139. *Wilkinson v. Alston*, 48 L.J. Q.B. 733, is a very strong case in the plaintiffs' favour. This was not referred to in the Manitoba case.

The recent case of *Burchell v. Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614, was applied in *Stratton v. Vachon*, 44 S.C.R. 395. The last case proceeds upon the ground that the agent had brought the owner into relation with the person who finally became the purchaser, and was, therefore, entitled to the customary commission.

The plaintiffs having brought the parties together and a sale having been effected by their intervention, it is not sufficient, in my opinion, to disentitle them to a commission to say that the vendor had proceeded with his negotiations with the pur-

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chaser without the knowledge that the agents had been instrumental in bringing the parties together.

I think this point was involved in the decision in the *Wilkinson* case. After various negotiations, in that case, the sale was finally made by the agent writing a letter to a broker reminding him that the vessel was for sale. The broker took no notice of this letter, and neither the plaintiff nor the defendant was aware that the letter was written, but subsequently the broker wrote to the defendant, and afterwards disclosed the name of the principal for whom he was acting, and the sale was then effected. Bramwell, L.J., put the case very broadly: "The defendant practically said to the plaintiff, 'If you or White can find me a purchaser, and the purchase is completed, I will pay you a commission.' And the expression, 'If you can find a purchaser,' may be explained as meaning, if you can introduce a purchaser to myself, or can introduce a purchaser to the premises, or call the premises to the notice of the purchaser."

The decision of the Commission of Appeals, New York, is to the same effect, *Lloyd v. Matthews* (1872), 51 N.Y. 124. There the objection was taken that the seller is entitled to know that the party with whom he is dealing is a customer of the broker, if such be the fact. In dealing with this objection, Lott, Ch.C., said: "The sixth proposition is not correct. It is to be understood, in the connection in which it is presented, as declaring that, although a party is brought, through the agency and instrumentality of the broker, into a negotiation and dealing with the owner, which actually results in a sale, yet the broker is not entitled to compensation, unless it is made known to the owner that the purchaser is his customer. That is not true. It is sufficient that the purchaser is in fact such customer."

With respect, I think the judgment appealed from should be set aside and judgment entered for the plaintiffs for the amount of their commission, with costs here and below.

LATCHFORD, J.:—That the defendant employed the plaintiffs to sell the property is found as a fact by the learned trial Judge. The finding is amply supported by evidence, though denied upon oath by Mr. Galbraith. No limit as to time was imposed when authority to find a purchaser was given, nor was that authority ever revoked. It is satisfactorily established that the property



was brought to the notice of the purchaser by the plaintiffs. They sent her a list of houses, which included the defendant's, and took her to examine his house. The proceedings subsequent to the introduction of the property to the purchaser were conducted without further intervention by the plaintiffs; and the defendant, when he closed the transaction, was not aware that the purchaser had been introduced to the property by the only agents with whom he had placed it for sale.

The contract between the defendant and the plaintiffs was that he would pay a commission if they would find a purchaser. To apply the words of Lord Justice Brett in *Wilkinson v. Alston*, 48 L.J. Q.B. 733, they would in point of law fulfil the contract if they introduced the property to the notice of the purchaser and the latter purchased it in consequence of that introduction, though all proceedings subsequent to that introduction were carried on between the principals without any further intervention by the agents. It would be impossible to find authority more directly in point. The case does not appear to have been cited in *Locators v. Clough*, 17 Man. L.R. 659, nor to the trial Judge in this case. It was referred to and followed in *Sager v. Sheffer*, 2 O.W.N. 671, and is in principle and authority to be preferred to the decision of the Manitoba Court. See also *Stratton v. Vachon*, 44 S.C.R. 395.

I think the appeal should be allowed, with costs here and below.

SUTHERLAND, J., concurred.

*Judgment accordingly.*

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## [DIVISIONAL COURT.]

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## RICH v. MELANCTHON BOARD OF HEALTH.

*Public Health Act—Services of Physician Employed by Local Board of Health—Remuneration—Action for—Mandatory Order — Liability — Proper Remedy—Prerogative Writ of Mandamus—Order under Con. Rule 1091—Jurisdiction of County Court—Reasons for Judgment—Costs.*

The members of a Local Board of Health are not, under the Public Health Act, R.S.O. 1897, ch. 248, constituted a corporation; and the Board as a whole is not personally liable nor are the members individually liable to be sued for the recovery of a medical claim as a private debt. The remedy is to be sought against the Board as a public body, by seeking the grant of a writ of mandamus requiring the Board to issue an order upon the municipality for the amount of the claim.

*Bibby v. Davis* (1902), 1 O.W.R. 189, not followed.

*Sellers v. Village of Dutton* (1904), 7 O.L.R. 646, and *Ross v. Township of London* (1910-11), 20 O.L.R. 578, 23 O.L.R. 74, followed.

The writ is the prerogative writ of mandamus; and the order substituted therefor may now be issued by any of the Divisions of the High Court, but not by an inferior Court, and is issued upon summary application: Con. Rule 1091.

The mandamus which may be awarded in an action is either in the nature of the old equitable mandatory injunction, or is merely ancillary to the enforcement of a legal right for which an action may be maintained at law.

Judgment of the County Court of Dufferin affirmed, with a variation as to costs.

*Per* BOYD, C.:—Reasons for the judgment below should have been given.

AN appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Dufferin, dismissing an action brought in that Court by a physician to recover \$30 for services performed under the direction of the Board of Health of the Township of Melancthon. The plaintiff sought a personal judgment and a mandatory order to enforce it.

March 5. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

*W. H. Harris*, for the plaintiff, argued that the Board of Health had been properly sued, and cited *Bibby v. Davis* (1902), 1 O.W.R. 189, and *Ross v. Township of London* (1910-11), 20 O.L.R. 578, 23 O.L.R. 74. The plaintiff was the duly appointed medical health officer of the Board. He did work on the direction of the Board, and should be paid therefor: Public Health Act, R.S.O. 1897, ch. 248, sec. 122.

*W. C. Chisholm*, K.C., for the defendants, contended that the plaintiff was not properly authorised by the Board of Health. The plaintiff should have notified the Board before undertaking

to do the work himself. Then the Board could have compelled the people whose house was cleaned to pay for the disinfection thereof. Besides, the plaintiff's remedy, if any, was by application for mandamus, and not by action. He referred to *Ross v. Township of London, supra*, and the cases there cited.

*Harris*, in reply.

March 8. *Boyd, C.*:—This is an unfortunate bit of litigation for the plaintiff. He is entitled to be paid \$30 for his medical services, rendered at the instance of the Board of Health, but cannot recover it by this method. The miscarriage is not to be wondered at, considering the state of the cases and the vague and rather embarrassing clauses of the Public Health Act—which invite, and are, I understand, about to receive clarifying amendments: R.S.O. 1897, ch. 248.

It is now pretty well settled that the members of the Board are not constituted a corporation, though they have been judicially spoken of as a quasi-corporation; and it is also settled that the Board as a whole is not personally liable nor are the component members thereof individually liable to be sued for the recovery of medical claims as for a private debt. The remedy is to be sought against the Board as a public body, if payment cannot be otherwise obtained—by seeking the grant of a writ of mandamus requiring the Board to issue an order upon the municipality for the amount of the claim, in order that payment may be made out of the funds applicable thereto.

The writ is the high prerogative writ, so-called, available in cases where there is no right of action for the recovery of the claim, and relief is to be sought against a public body who fail to perform statutory or other public duties imposed upon that body, for the benefit of the applicant. This plaintiff by his pleading seeks a personal judgment for the amount, and also asks for a mandatory order to enforce it, and for that purpose sues the public body under the name of the Board of Health for the Township. The personal judgment he cannot get, and for this reason he cannot in and by an action get a mandatory order. Nor could he, in any circumstances, get the mandatory order of the character required from an inferior Court, such as the County Court. The prerogative writ of mandamus, which is the appropriate

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method of relief, can be issued only by the High Court. Originally confined to the King's Bench alone, it may now be issued by any of the Divisions of the High Court, as was explained in the case reported in 19 P.R. 329, 332, *Toronto Public Library Board v. City of Toronto* (1900).

The case of *Bibby v. Davis*, 1 O.W.R. 189, which may have misled the plaintiff, is not now to be followed in the light of later decisions: *Sellars v. Village of Dutton* (1904), 7 O.L.R. 646; *Ross v. Township of London*, 20 O.L.R. 578, affirmed in appeal, 23 O.L.R. 74. See also, as to the writ, *City of Kingston v. Kingston, etc., Electric R.W. Co.* (1897), 28 O.R. 399, and in appeal (1898), 25 A.R. 462.

There is an inherent lack of jurisdiction in the County Court to deal with this claim; but the matter was not contested on the line above indicated on the appeal before us. We are all in the dark as to what took place on the trial below; the only judgment given being that the action is dismissed with costs. This curt disposal of appealable cases has often been commented upon as unfair to the suitors and to the Court of Appeal. When reasons are given for the judgment, it enables the dissatisfied litigant to judge whether to appeal or not, and these reasons are a material assistance to the appellate Court. In brief, when reasons for the judgment exist, they should be given; when they are not given, it may be that the rule "*de non apparentibus*," etc., will excuse.

The defendants raised an issue disputing the claim which was vexatious and did not take the vital point on which we decide; so that, while the appeal is disallowed, we think the proper order to make is to dismiss both action and appeal without costs.

This is to be without prejudice to the plaintiff prosecuting his claim as he shall be advised—if the municipality does not provide means for payment.

LATCHFORD, J.:—I agree.

MIDDLETON, J.:—I agree with my Lord the Chancellor, and only desire to add to what he has said, for the purpose of explaining more at length the reason why I think that an action for a mandamus or a mandatory order is not the proper or permis-

sible remedy. Some confusion has arisen from a failure to keep in mind the historical origin of the present jurisdiction of the High Court, and by reason of the term "mandamus" being used to indicate several distinct things.

The Court of Chancery always had jurisdiction to enforce certain rights by means of a mandatory injunction, as well as by specific performance. Prior to the Common Law Procedure Act, the Courts of Law had no such power.

The Court of King's Bench, as one of the Crown prerogatives, had the right to issue the prerogative writ of mandamus. The scope of this writ was very widely different from the mandatory order in Equity.

The Common Law Commissioners of 1834 reported in favour of an amendment by which the Courts of Law should be given the same jurisdiction as the Court of Equity to restrain the violation of legal rights, in cases in which an injunction might issue for that purpose from Courts of Equity. Following this, the Common Law Procedure Act of 1854 provided that a plaintiff at law might claim a writ of mandamus "commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested." This writ was to have the same force and effect as the peremptory writ issued out of the Queen's Bench. This statute was subsequently enacted here, and in its present form is found as Con. Rules 1081-1083.

One of the cardinal principles governing the issue of the prerogative writ was, that it would never be granted where the applicant had some other remedy open to him. After the passing of the Common Law Procedure Act, it was suggested that the power conferred upon that Court to award a mandamus in an action practically superseded and rendered obsolete the peremptory writ. In *The Queen v. Lambourn Valley R.W. Co.* (1888), 22 Q.B.D. 463, it was said by Pollock, B., that "since the passing of this Act it cannot be said that the plaintiff has no specific remedy to enforce the right which he says has been denied to him;" and by Manisty, J.: "In 1854, a remedy which did not exist before was given by the Legislature, viz., an action of mandamus, which is in fact for a decree ordering the performance of the duty which the Court thinks ought to be done, and is a more convenient proceeding than by the prerogative writ."

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This view of the effect of the statute has not been generally accepted; and in *Smith v. Chorley District Council*, [1897] 1 Q.B. 532, Kennedy, J., collects the subsequent decisions in which it has been commented upon, and adopts as a more accurate statement of the law that found in *Baxter v. London County Council* (1890), 63 L.T.R. 767, at p. 771, where Day, J., says: "The true and only remedy which the plaintiff has for the purpose of enforcing the rights which I am of opinion he has got, is by a prerogative writ of mandamus. When I objected that this was a matter for mandamus, I was answered that this was an action for a mandamus. It is an action for a mandamus based upon the Common Law Procedure Act, 1854, and the action for a mandamus is simply an attempt to engraft upon the old common law remedy a right in the nature of specific performance. When private persons had rights one against the other, the Court had power to grant a mandamus or direct specific performance, or something in the nature of an injunction, to command that the right claimed by the one party should be acceded to by the other. But it was never contemplated that the action for a mandamus was to supersede the prerogative writ of mandamus. In this case no action will lie. I am perfectly clear that this is not an action which will lie between the parties, or a case in which a statutable mandamus will be applicable, because no action would lie, and a mandamus is only granted as ancillary to the action, and for the purpose of enforcing the private right in respect of which the private litigation had arisen. It was never contemplated that a private mandamus should be granted in cases in which a prerogative mandamus had, from time whereof memory does not run to the contrary, been alone the effective remedy."

This is quite in accordance with the view taken in other cases by other Judges. In *Glossop v. Heston and Isleworth Local Board* (1879), 12 Ch.D. 102, at p. 122, Brett, L.J., speaking of the mandamus referred to in the section of the Judicature Act corresponding with the Ontario Judicature Act, R.S.O. 1897, ch. 51, sec. 58, sub-sec. 9—which provides that "a mandamus or an injunction may be granted . . . in all cases in which it shall appear to the Court to be just and convenient"—says that the case before him "is not brought within the rule, that would enable the Court of Chancery to grant a mandatory injunction. It is



said that, nevertheless, the defendants are liable to a mandamus to do their duty. Now, supposing they had neglected or refused to do their duty, then I think they would have been liable to a mandamus, but not to a mandamus to be granted by the Chancery Division. It would have been a prerogative mandamus, as it is called, to them as a public body to enter upon and do their duty. That, as it seems to me, under the Judicature Act as it was before, is a remedy that can be granted only in the Court of Queen's Bench. I think the mandamus spoken of in the . . . Judicature Act is not the prerogative mandamus, but only a mandamus which may be granted to direct the performance of some act, of something to be done, which is the result of an action where an action will lie."

In the case already quoted, Kennedy, J., deals with the series of cases in which an action for mandamus had been successfully brought against public bodies, by stating that they are all cases where there was a debt and "in which the relief by mandamus might properly be termed ancillary relief."

The cases in our own Courts dealing with the right of a physician employed by a Local Board of Health, shew that there is no debt. The situation is analogous to that existing in *The King v. Beeston* (1790), 3 T.R. 592, where a mandamus was issued against the churchwardens and overseers directing payment of a sum payable out of certain parish funds, upon a contract which the parish overseers had made under a statutory power—the churchwardens not being "technically a corporation; but as far as concerns the regulation of the poor of the parish they stand in *pari ratione*." Upon the same principle, it is said in *Mayor, etc., of Salford v. County Council of Lancashire* (1890), 25 Q.B.D. 384, that an action for mandamus would not lie, because there was no debt, and the plaintiffs' only remedy was by the peremptory writ of mandamus.

Under our practice, the peremptory writ of mandamus having been superseded by the simple procedure of Con. Rule 1091, the convenience urged in some of the English cases in favour of the action of mandamus disappears. Apart from this, the great weight of modern authority is in favour of the view I have indicated, that the mandamus which may be awarded in an action is either

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in the nature of the old equitable mandatory injunction, or is merely ancillary to the enforcement of a legal right for which an action might be maintained at law.

It should also be borne in mind that the County Court has no jurisdiction to grant a peremptory writ. While the Con. Rules govern the practice and procedure in County Court actions, they do not confer any jurisdiction upon the County Court. The jurisdiction of the County Court must be sought in the County Courts Act; and, while the County Court has jurisdiction in actions for equitable relief, where the subject-matter does not exceed \$500, and while it has "as regards all causes of action within its jurisdiction . . . power to grant . . . such relief, redress or remedy . . . by the same mode of procedure, and in as full and ample a manner as might and ought to be done in the like case before the High Court,"\* it has not the right to entertain an application for the old prerogative writ, this being vested in the High Court only.

*Action and appeal dismissed without costs.*

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\*County Courts Act, 10 Edw. VII. ch. 30, sec. 28.

## [DIVISIONAL COURT.]

WADSWORTH V. CANADIAN RAILWAY ACCIDENT INSURANCE CO.

D. C.

*Accident Insurance—Death Claim—Cause of Death—Construction of Policies—“Caused by the Burning of a Building”—“Injuries Happening from Fits”—Efficient Cause—Quantum of Indemnity.*

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W., who was insured by the defendants under two policies of accident insurance, entered a wooden building at night, with a lighted lantern; while there he had a fit, and in the fit dropped or knocked over the lantern; the lantern exploded or was broken, the oil escaped from it, and a flame arose, which enveloped the deceased, and inflicted injuries from which he died:—

*Held*, that the injuries were not “caused by the burning of a building,” within the meaning of a double indemnity clause in the policies.

And *held* (LATCHFORD, J., dissenting), that the case was not one of “injuries happening from any of the following causes . . .”—one of the causes specified being “fits”—within the meaning of a clause in the policies limiting the amount payable in such cases to one-tenth of the amount of the single indemnity. The fit was not the efficient cause of the death. The injuries “happened” not from the fit but from the fire. The cause of an efficient cause is not itself an efficient cause or *causa causans*.

Review of the authorities.

Judgment of MIDDLETON, J., varied.

APPEAL by the plaintiff from the judgment of MIDDLETON, J., who tried the action without a jury at Ottawa, in so far as the judgment was against the plaintiff.

The action was brought to recover the amounts due under two policies of accident insurance issued by the defendants to John Allen James Wadsworth in favour of his wife, the plaintiff.

The two policies were in the same form. The insurance was stated to be “against bodily injuries caused solely by external, violent, and accidental means,” as specified in a schedule, and “against disability from sickness.” The principal sum of each policy was stated to be, in the first year \$5,000, with 5 per cent. increase annually for ten years, amounting to \$7,500. Under “Schedule of Indemnities,” it was stated in “Part A” that, “if any of the following disabilities shall result from such injuries alone, within ninety days from the date of accident, the company will pay in lieu of any other indemnity . . . for loss of life, the principal sum.” For loss of both hands, loss of entire sight, etc., the principal sum was also payable. “Part C,” headed “Double Payments,” stated: “If such injuries are sustained while riding as a passenger . . . or are caused by the burning of a building in which the insured is therein (*sic*)

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at the commencement of the fire, the amount to be paid shall be double the sum specified in clause under which the same arises." "Part G: In case of injuries happening from any of the following causes . . . fits, vertigo, sleep-walking, duelling . . . causing . . . the company will pay one-tenth of the amount payable for bodily injuries as stated in Part A. . . ." "Part H: In case of the happening of injuries mentioned in special indemnity clauses D, E, F, and G, claims shall be made only under said clauses, and the amount to be paid under said clauses shall be the full limit of the company's liability, and such claim shall not be entitled to double benefit as provided in Part C."

The policies were dated respectively the 24th December, 1907, and the 30th July, 1909, and all the premiums were paid by Wadsworth until his death on the 24th October, 1910.

The plaintiff alleged that the case came within "Part C," death being "caused by the burning of a building in which the insured is . . . at the commencement of the fire," and claimed \$11,000 and \$10,500 under the policies respectively. The defendants tendered \$1,075, which was refused. The defendants took the position that "Part G" and "Part H" applied, and that the utmost to which the plaintiff was entitled was \$550 under one policy and \$525 under the other.

The trial Judge found that the death of the assured resulted from a fit, which caused the upsetting of a lantern, whereby the building in which the assured was was set on fire, and the assured received the injuries from which he died; and the judgment at the trial in favour of the plaintiff was, therefore, limited to the two sums of \$550 and \$525; and the plaintiff appealed.

November 1, 1911. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., RIDDELL and LATCHFORD, JJ.

*R. V. Sinclair*, K.C., and *H. Aylen*, K.C., for the plaintiff, argued that the evidence did not justify the findings of the learned trial Judge, that the death of the deceased was caused by a fit, and that he was subject to the form of epilepsy known as *petit mal*. The latter finding was based on the evidence of a medical witness, and was a mere inference from a previous attack, which



the Judge found to have been a faint. Probably the deceased became unconscious owing to his weak condition, and the lantern exploded, the result being that the building was set on fire, and the insured suffered the injuries which were the cause of his death. Even if the deceased did have a fit, that was not the efficient cause of his death. As regards the double liability clause, they argued that the injuries were "caused by the burning of a building," within the meaning of the policy, and that it was not necessary that the building should have been wholly burned, in order to sustain the plaintiff's claim. The following cases were referred to: *Lawrence v. Accidental Insurance Co.* (1881), 7 Q.B.D. 216; *Winspear v. Accident Insurance Co.* (1880), 6 Q.B.D. 42; *Wicks v. Dowell & Co. Limited*, [1905] 2 K.B. 225; *Clover Clayton & Co. Limited v. Hughes*, [1910] A.C. 242; *Canadian Casualty and Boiler Insurance Co. v. Boulter, Canadian Casualty and Boiler Insurance Co. v. Hawthorne* (1907), 39 S.C.R. 558; *Mardorf v. Accident Insurance Co.*, [1903] 1 K.B. 584; *In re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591; *Reynolds v. Accidental Insurance Co.* (1870), 22 L.T.N.S. 820; *Houlihan v. Preferred Accident Insurance Co. of New York* (1908), 145 N.Y. St. Repr. 1048; *Manufacturers' Accidental Indemnity Co. v. Dorgan* (1893), 58 Fed. Repr. 945, especially at pp. 954, 955, where the English cases are considered.

*I. F. Hellmuth*, K.C., and *J. G. Gibson*, for the defendants, argued that, as to the question of fact, the finding of the learned trial Judge that the injuries sustained by the insured, causing his death, happened from "fits," within the meaning of the policy, was fully warranted by the evidence, and should not be disturbed. As regards the construction of the policy, it was submitted that "Part G" was not a clause exempting the defendants from liability in certain cases, but was one of several clauses fixing their liability at different sums according to the different risks, so the cases cited by the appellant, all of which deal with exceptions or exemptions from liability, had no application to the case at bar.

*Sinclair*, in reply.

March 9, 1912. FALCONBRIDGE, C.J.:—After long and careful consideration, in the course of which I have many times perused the numerous authorities cited (citations from which appear in

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my brother Riddell's judgment), I have come to the conclusion (with great respect and after much hesitation) that I do not agree with the judgment appealed from, and think that it ought to be reversed.

"Part G" of the policy which has to be construed is as follows: "In case of injuries happening from any of the following causes, viz., intentional injuries inflicted by the insured or any other person (other than burglars or robbers) fits . . . sleep-walking . . . causing death, loss of sight or limb . . . the company will pay one-tenth of the amount payable . . ."

It is by no means easy to construe; and, as my brother Middleton says, in none of the cases is there any attempt to construe such a clause.

I do not know whether there is any light shed on the subject by consulting the dictionaries as to the meaning of the verb "to happen" (same root as "capio"). The Imperial defines it: "1. To come by chance; to come without one's previous expectation; to fall out. . . . 2. To come; to befall." Murray (Oxford Dictionary) says: "To come to pass (originally by 'hap' or chance); to take place; to occur, betide, befall. The most general verb to express the simple occurrence of an event, often with little or no implication of chance or absence of design."

While the clause does not aim to destroy absolutely the liability of the company, yet its language is intended to limit that liability to a fractional amount of the sum payable under other circumstances, and so it ought to be construed strongly against the company. The insurer accepts the policy with the view and for the purpose of covering all accidents which may "happen" to him. In *In re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591, Vaughan Williams, L.J., says, at p. 596: "I start with the consideration that it has been established by the authorities that in dealing with the construction of policies, whether they be life, or fire, or marine policies, an ambiguous clause must be construed against rather than in favour of the company." Farwell, L.J., at p. 600, expresses the same view.

The cases of *Winspear v. Accident Insurance Co.*, 6 Q.B.D. 42, and *Lawrence v. Accidental Insurance Co.*, 7 Q.B.D. 216 followed in the United States in *Manufacturers' Accident In-*

*demnity Co. v. Dorgan*, 58 Fed. Repr. 945, would be absolutely in point if in the *Lawrence* case the fit had started the train which passed over the deceased, and in the *Winspear* case the fit had set loose the flow of water which drowned the insured. But, on a consideration of the numerous cases on the subject of proximate cause and *causa sine quâ non*—e.g., the illustration that the birth of the insured was a cause of the accident, inasmuch if he had never been born the accident could not have happened—I have arrived at the conclusion that, notwithstanding the finding of the trial Judge, which we are bound to accept, that it was the fit that caused the upsetting of the lantern and the subsequent fire, the injuries “happened” not from the fit but from the fire.

Therefore, I agree with my brother Riddell in thinking that the appeal should be allowed in part, and judgment entered for the plaintiff for \$10,750 and interest from the teste of the writ; the plaintiff to have costs of the trial; no costs of appeal to either party.

RIDDELL, J.:—This is an appeal from the judgment at the trial by Mr. Justice Middleton, without a jury, at Ottawa, June, 1911. John Allen James Wadsworth, a man of some means, living in Ottawa, procured from the defendants two policies of accident insurance of date the 24th December, 1907, and the 30th July, 1909, respectively, in favour of his wife, the plaintiff. The material part of the policies—they are in the same form—is here subjoined:—

“The Canadian Railway Accident Insurance Company, Ottawa, Can., in consideration of the statements, agreements . . . in the application and of the annual premium of . . . . . payable . . . . . does hereby insure John Allen James Wadsworth . . . against bodily injuries caused solely by external, violent and accidental means, as specified in the following schedule (subject, however, to the terms and conditions hereinafter contained), and against disability from sickness, as follows:—

“This policy may be renewed from year to year upon payment of the annual premium, payable as aforesaid in each year during the continuance in force thereof, and the payment of

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each consecutive full year's renewal premium of this policy shall add five per cent. to the principal sum of the first year until such additions shall amount to fifty per cent., and thenceforth so long as this policy is maintained in force the insurance shall be for the original sum plus the accumulation of fifty per cent., as aforesaid.

"The principal sum of this policy in the first year is \$5,000; with five per cent. increase annually for ten years will amount to \$7,500.

"SCHEDULE OF INDEMNITIES.

"Part A.—If any of the following disabilities shall result from such injuries alone, within ninety days from the date of accident, the company will pay in lieu of any other indemnity:

	IN ONE PAYMENT
FOR LOSS OF LIFE.....	the principal sum
FOR LOSS OF BOTH HANDS by severance at or above the wrist.....	the principal sum
FOR LOSS OF BOTH FEET by severance at or above the ankle.....	the principal sum
FOR LOSS OF ONE HAND at or above the wrist, and ONE FOOT at or above the ankle.....	the principal sum
FOR LOSS OF ENTIRE SIGHT OF BOTH EYES, if irrecoverably lost.....	the principal sum
FOR LOSS OF EITHER HAND by severance at or above the wrist.....	1/2 of " "
FOR LOSS OF EITHER FOOT by severance at or above the ankle.....	1/2 of " "
FOR LOSS OF ENTIRE SIGHT OF ONE EYE, if irrecoverably lost.....	1/3 of " "

"The payment of one principal sum in any case shall end this policy.

. . . . .

"DOUBLE PAYMENTS.

"PART C.—If such injuries are sustained while riding as a passenger in any passenger steamship or steamboat, or in any steam, cable or electric passenger railway conveyance, or in a

passenger elevator, or are caused by the burning of a building in which the insured is therein at the commencement of the fire, the amount to be paid shall be double the sum specified in clause under which the claim arises.

"PART G.—*In case of injuries happening from any of the following causes, viz., intentional injuries inflicted by the insured or any other person (other than burglars or robbers), fits, vertigo, sleep-walking, duelling, war or riot, exposure to unnecessary danger, engaging in bicycle, automobile or horse racing, or while under the influence of intoxicating liquors or narcotics, causing death, loss of sight or limb as stated in Part A, the company will pay ONE-TENTH of the amount payable for bodily injuries as stated in Part A, under which claim arises; or, if such injuries result in total or partial disability as provided in Part B, the company will pay ONE-TENTH of the amount payable for weekly indemnity as stated in said Part B, under which claim arises.*

"PART H.—In case of the happening of injuries mentioned in special indemnity clauses D, E, F and G, claims shall be made only under said clauses, and the amount to be paid under said clauses shall be the full limit of the company's liability, and such claim will not be entitled to double benefit as provided in Part C." (The italics are mine).

Wadsworth paid all premiums due until his death on the 24th October, 1910, under circumstances which will be set out later in this judgment. The widow claimed that the case came within Part C, as being "caused by the burning of a building in which the insured is therein (*sic*) at the commencement of the fire," and claimed \$11,000 and \$10,500 under the policies respectively; the company tendered \$1,075, which was refused. The position taken by the company was, that Parts G and H applied, and that the whole amount (if anything) to which the plaintiff was entitled was \$550 under the one policy and \$525 under the other.

On action brought, the defendants pleaded that Wadsworth had in the application represented that he had never had and was not subject to fits, or disorder of the brain, or any bodily or mental infirmity, which the company alleged was untrue, as

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he had had and was subject to fits or vertigo; and these mis-statements were material.

At the trial, it was decided, on satisfactory evidence, that the only instance of illness or anything which could be considered as coming under the description did not take place till long after the issue of the policies; and there is nothing to indicate that there was any misrepresentation. The other defence the learned trial Judge gave effect to; and this forms the subject of the present appeal.

The facts surrounding the death of the insured are not complicated. In October, 1910, the insured went, with other members of a hunting club, to their club-house in the township of Hincks. On the 23rd October, some of the members of the club were out all day hunting; and, when they came in comparatively late and after supper-time, Wadsworth, who does not seem to have been out that day in the afternoon, said he was not feeling well and did not feel like eating—he did not have any supper and went and lay down upstairs. About 8.20 or 8.30 he came downstairs, declined an offer of something to eat, and asked the chore boy to open a bottle which he had. This the boy did; and the deceased, dissolving a tablet in some fluid out of this bottle, drank the solution. He then left the room and went outside. A dog was heard barking shortly after; and, when the boy went out to investigate, he noticed the water-closet on fire. The alarm was raised, and a number of persons ran to the burning building with water; after the fire was extinguished at least in part, the deceased was found sitting at one end of the building and on the opening of the seat of the closet, or perhaps the boards of the seat, leaning back against the wall, his trousers not lowered. He was taken out moaning, apparently in pain, carried limp as he was to the club-house and put on a table. He was found to be rather badly burnt about the feet, up the back of the buttocks, and around the face and head; also a patch on the chest and on the shoulders.

He received treatment from a medical man who was one of his club-mates, and was shortly thereafter removed to Ottawa and placed in the Carleton General Hospital, where he died the next day, of shock.



The closet was a small building, some  $4\frac{1}{2}$  or 5 feet long and about as much in depth, with no front but with wooden sides and back, and with two holes in the seat.

Next day, the boy found in the bottom (*i.e.*, as we are informed, the pit) the side of an ordinary stable lantern, such as was in use at the club for going out with; and, while Wadsworth had not taken a lantern out with him, so far as the witness could say, there was one noticed missing next day. It seems fairly clear that Wadsworth took the lantern with him to light him to the closet, it being quite dark when he went out, and it being usual to take a lantern on such occasions.

The building was not burnt, not even badly scorched, and there was no smell of oil on the day after the accident, when Labelle found the lantern; no considerable part of the lantern seems to have been found except the "side" which was found in the pit—the globe was not found, but one witness saw, on the night of the casualty, broken glass, the shape of a globe, lying on the platform or floor of the closet opposite one of the seats. We are told that this was at the opposite end of the closet from where Wadsworth was found, but I do not find this made clear upon the evidence, and I cannot say that it is material one way or the other.

In July of the same year, Wadsworth, at the same clubhouse, after dinner, "seemed to faint away;" it was very warm, but he did not seem to be suffering from the effects of the heat.

The medical man who attended him at the club gave a certificate on the 29th October, saying, amongst other things: "I can only account for his getting burned by believing that he must have taken a fit or fainted and in so doing upset the lantern, thus setting himself on fire. Everything in connection with the burning seems to indicate this."

From the evidence of this medical man and another called at the trial, my brother Middleton came to the conclusion that the unfortunate man "took a fit when he was in the closet, and that, while in that fit, he either dropped or knocked over the lantern, the lantern exploded or was spilled or was broken by the fall, the result was that the oil escaped, and there was almost immediately a very extensive flame, which enveloped him and inflicted the very severe injuries from which he died." And

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the deceased was affected with a "malady . . . known as minor epilepsy or *petit mal*."

I think my learned brother's conclusion amply sustained by the evidence; and I have arrived at the same conclusion from an independent consideration of the facts as proved.

It seems to me also clear that the injuries were not "caused by the burning of a building" at all.

What is said about the building is, indeed, that it was on fire, not very badly scorched; the cook told others of the fire; that the closet was on fire; but, as one of the witnesses threw a pail of water upon the roof, it may perhaps be inferred that the building did burn—that it was a "burning building" within the meaning of the policy—as in law (*Regina v. Parker* (1839), 9 C. & P. 45, *per Parke, B.*), it is sufficient that it be scorched and charred in a trifling way.

But the condition of Part C is not that the injuries be sustained while in a burning building; the language is not the same as in the former part of Part C," "sustained while riding . . . in any . . . steamboat . . . railway conveyance . . ."—the words are not "sustained while in a burning building," but "caused by the burning of a building." We are referred to *Houlihan v. Preferred Accident Insurance Co. of New York*, 145 N.Y. St. Repr. 1048, as deciding that the two expressions are synonymous. In that case the leading judgment by Clarke, J. (in which all but one of the other Judges concurred, and he agreed in the result), says (p. 1050): "It must be that what was attempted to be guarded against was injury in the insured resulting from fire while in a building." In this conclusion I am unable to agree—the words "caused by the burning of a building" have a clear and unambiguous meaning, and a meaning distinctly differing from that of the words employed by the learned New York Judge. Nor, in my view, does the case of *Northrup v. Railway Passenger Assurance Co.* (1871), 43 N.Y. 516, cited as supporting the conclusion, assist, even if it be well decided—that being simply a decision that, where a passenger had to walk from a railway station to a steamboat landing, 70 rods distant, she did not cease to be "travelling by . . . public conveyance provided for the transportation of passengers."

But, if we were to give full authoritative weight to the *Houlihan* case, I do not think that, even then, the plaintiff would have made out her case. There the bedclothes and mattresses of the bed upon which the deceased slept were burned, her night clothes were burned from her and other circumstances shewed that it was the burning of permanent or quasi-permanent furnishing and contents of the room which set fire to her—it was not, as in this case, the blazing up and burning of oil brought by the deceased into the room for a purely temporary purpose. Whatever may be the law in the case of the burning being caused by the ignition of permanent or quasi-permanent contents of a room, I venture to think that no stretch of language can reasonably make injuries caused by the burning of oil which is brought into the room by the insured for a temporary personal purpose only come within the meaning of the words “caused by the burning of a building.”

This claim of the plaintiff is, in my view, not well founded.

Then, as to the application of Parts G and H. The meaning of G, so far as affects the present case, is: “In case of injuries which happen from fits or vertigo, and which injuries cause death, the company will pay one-tenth of the amount stated in Part A”—the participle “causing,” in the third line, being in the same grammatical relation as the participle “happening” in the first line. The clause does not mean, “In case of injuries which happen from fits or vertigo, which fits or vertigo cause or causes death,” etc., etc.

The only question then is, whether the injuries happened from fits or vertigo, because they undoubtedly did cause death.

In considering this question, we must look at the case from a common sense, business point of view, avoiding metaphysical subtlety; ever having in mind that such agreements, being in the language selected by the company, should, where there is a real ambiguity, be construed most strongly against the company, we are not, by too refined or unnatural an interpretation of the language employed, to conjure up an ambiguity where none really exists.

“It is only a fair rule . . . which Courts have adopted to resolve any doubt or ambiguity in favour of the insured and against the insurer.” *Manufacturers' Accident Indemnity Co. v.*

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*Dorgan*, 58 Fed. Repr. 945, at p. 956, *per* Taft, J. (now President Taft); but it would not be a fair rule to invent or imagine doubt or ambiguity where none can be found.

In view of the law as laid down by the decisions, I do not think, however, that there can be said to be any ambiguity or doubt.

The injuries which caused the death are the burns—did these happen from fits or vertigo?

I do not lay any stress whatever on the use of the plural “fits”—nor do I think that if the cause were an epileptic fit, the plaintiff could recover because the plural is used in the policy instead of the singular. “Fits” is colloquially the same as “fit:” *cf.* Murray, New English Dict., *sub voc.* “Fit,” pp. 262 *ad fin.*, 263 *ad. init. c. d.* Also in the English cases of epilepsy, which will be cited, the words “fits” is used in the policy, but the insured had only the one fit—indeed, in case at least of death, it would scarcely appear that more than one fit was to be considered. The burns were caused primarily and immediately by the fire—the fire was the proximate cause. In philosophy it is said “*causa causæ causantis, causa causans ipsa*”—and if, in law, the cause of the proximate cause were itself an efficient cause, there would be no difficulty in the present case. No doubt, the fire was caused by the fits and vertigo. Does that make these an efficient cause?

Two recent cases in England are strongly pressed upon us. In *Winspear v. Accident Insurance Co.*, 6 Q.B.D. 42, the policy did not extend to “any injury caused by or arising from natural disease or weakness or exhaustion consequent upon disease.” W., being the insured, was overtaken by an epileptic fit when fording a shallow stream; he fell down in the stream and was drowned. It was argued that “it was the fit which caused the drowning, for even after the insured had fallen into the stream he could have got his head out of the water but for the fit.” The Court of Appeal (Lord Coleridge, C.J., Baggallay and Brett, L.JJ.), however, held that the insurance company was liable, and that the death was not caused by any natural disease or weakness, but by the accident of drowning—that “those words in the proviso . . . point to an injury caused by natural disease, as if, for instance, in the present case, epilepsy had



really been the cause of death." There are two points of distinction between the *Winspear* case and ours: (1) there the cause of death was being considered; in ours, the cause of the happening of injuries; (2) there the epilepsy was not the cause of the presence of the water which drowned; here, the epilepsy was in a sense the cause of the fire which burned.

The *Winspear* case is referred to and followed in an American case, *Manufacturers' Accident Indemnity Co. v. Dorgan*, 58 Fed. Repr. 945, in which an elaborate and careful judgment is given by the present President of the United States, then Mr. Justice Taft. The deceased had been "overtaken by some temporary trouble," which caused him to fall into a brook, upon whose banks he was at the time; he was drowned. The insurance company was held liable, although the policy provided that they should not be liable for "accidental injuries or death resulting from or caused, directly or indirectly, wholly or in part, by or in consequence of fits, vertigo," etc., etc., "nor to any cause excepting where the injury is the sole cause of the disability or death." This case goes no further than the *Winspear* case.

The other English case most strongly relied upon is *Lawrence v. Accidental Insurance Co.*, 7 Q.B.D. 216. The policy did not insure in case of death arising from fits. The insured, standing at a railway station, was seized by a fit and fell forward off the platform when a train was passing—this went over his body and killed him. It was argued for the company that "the accident actually arose from the disease" (p. 218), but the Court, Denman, J., held them liable. He says (p. 219): "Now, the immediate cause of death is not in the least disputable, but there is no doubt that if he had not fallen there in consequence of the fit he would not have suffered death, and in that sense the fit led to his death. The question is whether that was merely one of several events which brought about the accident, in the sense that it caused the accident to happen by causing him to be there, or whether it was, within the meaning of this proviso, a cause of death which would prevent the policy applying to the case." In other words, was the fit a *causa causans* or a mere *causa sine qua non* (so-called) or condition? Watkin Williams, J., agreed. Quoting Lord Bacon's Maxims of the Law, Reg. 1—"It were infinite for the law to consider the causes of causes, and their

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impulsions one of another; therefore it contenteth itself with the immediate cause"—he says: "According to the true principle of law, we must look at only the immediate and proximate cause of death, and it seems to me to be impracticable to go back to cause upon cause, which would lead us back ultimately to the birth of the person, for if he had never been born the accident would not have happened. The true meaning of this proviso is that if the death arose from a fit, then the company are not liable, even though accidental injury contributed to the death in the sense that they were both causes. . . . It is essential to that construction that it should be made out that the fit was a cause in the sense of being the proximate and immediate cause of the death, before the company are exonerated, and it is not the less so, because you can shew that another cause intervened and assisted in the causation."

The same remarks apply to this as to the case in 6 Q.B.D.—the fit did not cause the train to come along—it was not the cause itself of the *causa proxima*.

To the same effect are the remarks of Collins, M.R., in *Wicks v. Dowell & Co.*, [1905] 2 K.B. 225, at p. 228, which case does not assist—nor am I able to derive any assistance from *Mardorf v. Accident Insurance Co.*, [1903] 1 K.B. 584.

If, in the case in 6 Q.B.D., the falling of the insured had let in the water which drowned him—or, in the case in 7 Q.B.D., the falling had automatically brought on the engine, the cases would be parallel with the present—but that is not the case; and, as a consequence, these cases are not conclusive.

But there are cases in which the proximate cause is not accompanied by another cause (*causa sine quâ non*), but has been actually caused itself by another cause, and it has been held that this last-named cause is not to be considered as the *causa causans*—to use Lord Bacon's terminology, we are not to look to the causes of causes.

In *Busk v. Royal Exchange Assurance Co.* (1818), 2 B. & Ald. 73, the servants of the assured negligently lighted a fire in the insured ship, whereby she was burned. The case was elaborately argued by Campbell and Bosanquet. Bayley, J., says, giving the judgment of the Court (p. 80): "In our law at least, there is no authority which says that the underwriters are not liable

for a loss, the proximate cause of which is one of the enumerated risks, but the remote cause of which may be traced to the misconduct of the master and mariners." The very learned Judge refers to many authorities also in foreign laws, and holds "that the assured are entitled to recover, as for a loss by fire, although that fire was produced by the negligence of the person having the charge of the ship at the time."

*Walker v. Maitland* (1821), 5 B. & Ald. 171, at p. 175, *Bishop v. Pentland* (1827), 7 B. & C. 219, at p. 223, *Phillips v. Nairne* (1847), 4 C.B. 343, at pp. 350, 351, *Patapsco Insurance Co. v. Coulter* (1830), 3 Peters (S.C.) 222, at p. 233, *Columbia Insurance Co. v. Lawrence* (1836), 10 Peters (S.C.) 507, at p. 517, *General Mutual Insurance Co. v. Sherwood* (1852), 14 How. S.C. 351, at p. 366, may also be looked at upon the general principle, but must be read with caution, as they have not the so-called remote cause, always the cause itself of that which is proximate.

A nice distinction is indicated by Story, J., giving the judgment of the Supreme Court of the United States, in *Waters v. Merchants' Louisville Insurance Co.* (1837), 11 Peters (S.C.) 213. In that case, barratry not being insured against, the Circuit Court divided in opinion, and the Supreme Court was asked, amongst other things: (1) Does the policy cover a loss of the boat by a fire, caused by the barratry of the master and crew? (2) Does the policy cover a loss of the boat by fire, caused by the negligence, carelessness, or unskilfulness of the master and crew of the boat, or any of them? The learned Judge says (p. 219), upon the first question: "It assumes that the fire was directly and immediately caused by the barratry of the master and crew, as the efficient agents. . . . In this view of it, we have no hesitation to say, that . . . such a loss is properly a loss attributable to the barratry, as its proximate cause, as it concurs as the efficient agent, with the element, *eo instanti*, when the injury is produced." But, as to the second question, it was held that the negligence could be only *causa remota*.

In our own Courts the case *Canadian Casualty and Boiler Insurance Co. v. Boulter*, *Canadian Casualty and Boiler Insurance Co. v. Hawthorne*, 39 S.C.R. 558, and in the Court below, *Hawthorne v. Canadian Casualty and Boiler Insurance Co.*, *Boulter v. The Same* (1907), 14 O.L.R. 166, are in point. There the

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policies contained a clause that they did not cover loss or damage resulting from freezing. A pipe connected with the sprinkler-tank system burst from freezing, and the water ran down upon and injured the stock. The trial Judge, the Chief Justice of the King's Bench, gave judgment for the insured, and this was sustained by the Court of Appeal and the Supreme Court—one Judge dissenting in each Court. The Chief Justice of the King's Bench does, indeed, suggest that the freezing was the cause of the injury, though not of the damage; but that must be read in connection with the facts of the case. It would appear also that the use of the word "immediate" had some influence on the Supreme Court. But, taking the case as a whole, I think it is authority for saying that the cause of an efficient cause is not itself an efficient cause or *causa causans*.

I think the appeal should be allowed in part, and judgment entered for the plaintiff for \$10,750 and interest from the teste of the writ. The plaintiff should also have the costs of the trial; success being divided, there should be no costs of the appeal.

The following have a more or less indirect bearing upon the matters discussed: *Trew v. Railway Passengers Assurance Co.* (1860), 5 H. & N. 211; *S.C.* (1861), 7 Jur. N.S. 878 (Cam. Scacc.); *Reynolds v. Accidental Insurance Co.*, 22 L.T.N.S. 820; *In re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591; *Clover Clayton & Co. Limited v. Hughes*, [1910] A.C. 242; *Dudgeon v. Pembroke* (1877), 2 App. Cas. 284; *Accident Insurance Co. v. Crandal* (1887), 120 U.S. 527; *Canadian Railway Accident Insurance Co. v. Haines* (1911), 44 S.C.R. 386.

LATCHFORD, J.:—I think the finding of the learned trial Judge, that the accident to the deceased happened because of a fit, is amply warranted by the evidence.

It is urged, however, that the death of Wadsworth resulted from burns, and not from fits; and that, therefore, Part G should not have been considered in determining the amount payable by the defendants.

The insurance is expressed to be "against bodily injuries caused solely by external, violent, and accidental means," as specified in a schedule.



In the first part of the schedule, under the heading "Schedule of Indemnities," it is provided—"Part A"—that, "if any of the following disabilities shall result from such injuries alone, within ninety days from the date of accident, the company will pay, in lieu of any other indemnity, for loss of life . . . hands . . . feet . . . entire sight of both eyes . . . the principal sum." This sum is \$5,000 under each of the two policies sued on, with an annual increase at the rate of five per cent.

Loss of life is thus defined as "a disability."

A disability, to form the basis of any claim against the company, "shall result from . . . bodily injuries . . . caused solely by external, violent, and accidental means."

The foundation of the plaintiff's action is, that her husband's death resulted from or was caused by injuries which were themselves caused by specified means. Mrs. Wadsworth was obliged to establish and did establish that external, violent, and accidental means caused injuries to her husband, and that injuries caused by such means caused his death.

So much it seems to me necessary to premise before coming to the consideration of the particular provisions of the contract around which the parties are contending.

The defendants allege and the plaintiff denies that Part G of the schedule affects, in the circumstances of the case, the amount to which Mrs. Wadsworth is entitled. If it does apply, the appeal fails; and the question whether it applies or not is, upon the facts as found, merely one of construction.

Part G has on principle to be construed upon a consideration of the whole contract. A policy of insurance is, in the words of Lord Ellenborough in *Robertson v. French* (1803), 4 East 130, at pp. 135, 136, "to be construed, according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless . . . the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense."

The main object and intent of the contract may be regarded

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as limiting any general words used having in view that object and intent: Lord Herschell, L.C., in *Glynn v. Margetson & Co.*, [1893] A.C. 351, at p. 355.

Part G cannot in any way be considered as in derogation of the object and intent of the contract. It is, as it purports to be, a part of the contract, and fixes the amount payable when death (*inter alia*) occurs from injuries resulting in certain ways from any of certain stated causes. If the language is clear, it may be construed upon the principles I have referred to; and there is no good reason why it should be given what is sometimes called a benign interpretation.

So far as material here, the provisions of Part G have reference to the "case of injuries happening from any of the following causes, viz., intentional injuries . . . fits . . . causing death, loss of sight or limb." "Causing" appears from the context of the whole clause to be in the same grammatical relation to "injuries" that "happening" is.

Part G clearly applies whenever injuries which cause death "happen" by accidental means from any of the specified causes, including a fit or "fits."

The injuries from which Wadsworth died happened from "fits," according to the finding of the trial Judge.

For the plaintiff it is contended that the "fits" must be shewn to be the immediate, proximate cause of death, before the defendants can invoke the provisions of Part G in their favour. So to construe Part G is, in my opinion, to subject it to a strain which, upon consideration of the whole contract, it cannot bear.

"In case of injuries," in Part G, has reference manifestly to injuries of the kind insured against—injuries resulting in disability, and "caused solely by external, violent, and accidental means." The succession of events directly resulting from the paroxysm—the overturning and breaking of the lighted lantern, the escape and ignition of the oil, the flames which enveloped Wadsworth, his inability owing to unconsciousness to give any alarm or extinguish his burning clothing—all are, in my opinion, but "means," within the true intendment of the policy, lying between the fit as a cause and the injuries as an effect of that cause. This conclusion appears all the more reasonable if one considers some of the "causes" enumerated in the same category

as "fits." "Sleep-walking," for instance, cannot be the immediate cause of "injuries causing death, loss of sight or limbs." Some accident must intervene; some means must lie between the mere somnambulism and any serious injury caused while in that state.

No support is, I think, given to the plaintiff's contention by the cases which have been cited on her behalf. They are but illustrations of the application of the maxim, *In jure non remota causa sed proxima spectatur*; and they apply, in matters of contract, wherever the agreement either expressly or by implication provides that the immediate cause must be looked to.

The many cases in which liability of insurers for loss caused by fire has been considered are authority for the proposition that, where such a loss has been insured against, it is immaterial that the fire itself was caused by the negligence of the agents or servants of the assured. The fire was the proximate cause of the loss sustained, and the cause of that cause could not be regarded. But, if the policies had provided that there should be no liability in case the fire resulted from such negligence, the decisions referred to would have been given for the defendants.

The case is not, to my mind, one in which it is necessary to consider whether the epileptic paroxysm was or was not the *immediate and proximate* cause of death. If it were, I should feel myself bound by *Winspear v. Accident Insurance Co.*, 6 Q.B.D. 42, and *Lawrence v. Accidental Insurance Co.*, 7 Q.B.D. 216. In both of these cases, as Lord Justice Collins points out in *Hensey v. White*, [1900] 1 Q.B. 481, at p. 485, there was a fortuitous unexpected element—the presence of a stream in the one case and of a moving railway train in the other—which turned a normal condition of affairs into a catastrophe. The fit did not cause the stream to drown Winspear. His condition did not cause the stream to flow where it was flowing when he fell into it. Lord Justice Collins points out that it was just as though the epileptic had been struck by lightning while lying on the ground. Nor did the fit in the *Lawrence* case cause the train to run which passed over the neck and body of the deceased. The decision in *Hensey v. White*, as to what is an "injury by accident," within the meaning of the Workmen's Compensation Act, 1897, was overruled in *Fenton v. Thorley & Co. Limited*,

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[1903] A.C. 443; but that circumstance in no way affects the force of the observations I have quoted.

And the reason occurs to me why the *Winspear* and *Lawrence* cases are distinguishable. In both (as here) the insurance was, *inter alia*, against death by accident. But in each there was an exception, that there should be no liability in certain circumstances. The defendants were obviously liable unless they could clearly bring themselves within the exceptions which, upon well recognised principles, were to be construed most strongly against the defendants. The exceptions were held not to be open to the defendants, because the accidents were not caused directly and proximately by the excepted causes. In the present case, the clause Part G, relied on by the defendants, is not in the nature of an exception. It is as much a term of the contract as the "face," as it has been called, of the policy, and simply states circumstances in which the amount of the company's liability is to be one sum, instead of another fixed by a different term of the policy. Moreover, the fit, as I have stated, was the *causa causans* of the breaking of the lantern and of the consequent injuries and death. If, in the *Winspear* case, the assured had, because of the fit, let loose a flood of water which overwhelmed him, or, in the *Lawrence* case, the assured had, because of the fit, started the engine which killed him—the decisions, notwithstanding the rules of construction applicable to exceptions, would have been different.

I am unable to see any reason, either upon principle or authority, why the judgment appealed from should not be affirmed.

*Appeal allowed in part; LATCHFORD, J., dissenting.*

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[MIDDLETON, J.]

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*Accident Insurance—Death Claim—Cause of Death—Injury from Lifting Heavy Weight—Evidence—Statement of Deceased—Admissibility—Conditions of Original Policy—Non-compliance with—Renewal Receipt—Fresh Contract—Reference to Original Policy—Sufficiency—Insurance Act, R.S.O. 1897, ch. 203, sec. 144.*

In an action by the beneficiary under a contract insuring Y. against accident and death from accident, to recover the amount payable upon death from accident, it appeared that, on the day before his death, Y. had lifted a heavy weight, and, shortly after doing so, had stated to S. that he thought he had hurt himself. According to the medical evidence, the malady from which Y. died was caused by the invasion of the system by pernicious bacteria, and this invasion might have been occasioned by an internal injury:—

*Held*, that evidence of the statement made to S. was admissible for the purpose of proving the physical condition of Y., and was sufficient to establish that, shortly after Y. had been engaged in lifting, he had, as he said, indications that he had been hurt.

*Gilbey v. Great Western R.W. Co.* (1910), 102 L.T.R. 202, specially referred to.

And *held*, that from the fact of the injury the inference might be drawn that the lifting was the cause of it; the symptoms indicated that Y. did suffer an injury in lifting; and, upon the evidence, this injury was the cause of his death—it being a possible cause and the only one of several possible causes shewn to have actually existed; and the evidence shewed that up to the happening of the accident Y. appeared to be in perfect health.

*In re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591, followed.

The policy issued upon the original insurance, in 1902, contained provisions and stipulations as to notice, made conditions precedent to the right to recover; and these had not been complied with. This policy did not contemplate any renewal; it evidenced an insurance for one year only. The plaintiff relied upon what was called a renewal receipt, as a new contract of insurance. It did not contain the provisions as to notice; it evidenced an insurance for a year "according to the tenor" of the original policy, referring to it by number:—

*Held*, that the contract evidenced by the renewal receipt was to be regarded as a new insurance, depending entirely upon a new agreement between the parties.

*Carpenter v. Canadian Railway Accident Insurance Co.* (1909), 18 O.L.R. 388, followed.

But *held*, that the reference to the former policy was a sufficient compliance with the provisions of the Insurance Act, R.S.O. 1897, ch. 203, sec. 144, requiring the terms and conditions of the contract to be set out on the face or back of the instrument; and, therefore, by reason of the plaintiff's non-compliance with the conditions of the original policy, she could not recover.

*Venner v. Sun Life Insurance Co.* (1890), 17 S.C.R. 394, and *Jordan v. Provincial Provident Institution* (1898), 28 S.C.R. 554, followed.

THE plaintiff sued as beneficiary under a policy issued by the defendants, insuring the late Henry Youlden against accident and death from accident, to recover the sum named in the policy.

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February 27. The action was tried before MIDDLETON, J., without a jury, at Kingston.

*J. L. Whiting*, K.C., for the plaintiff.

*W. N. Tilley* and *C. Swabey*, for the defendants.

March 12. MIDDLETON, J.:—The deceased had been insured with the defendants for some years, the policy having been issued on the 7th January, 1902, and the renewal premium paid on the 2nd January, 1909.

On the 23rd June, 1909, shortly after his dinner, the deceased—a member of a firm carrying on a foundry business in Kingston—was at the railway station, superintending and assisting in the loading of a retort upon a railway car. The retort weighed about three and a half tons, and had to be transferred from a dray to the railway car by means of jacks and other appliances. For the purpose of making a way for removing the retort, a heavy stick of timber, lying upon the railway premises, was desired to be used. This weighed from five to six hundred pounds. Youlden attempted to carry one end of this, while the other end was carried by two men. His partner Selby went to his assistance; and shortly afterwards Youlden remarked to him that he was afraid he had injured himself. He then sat in the shade at the station for a time, and, feeling faint, he went with Selby to an hotel and took a glass of whisky and soda, and thereafter did no more work, but returned to the shop upon a rig, and sat around doing little or nothing until six o'clock, when he went home. The same evening, without taking any supper, he went to a garden party, where a presentation was to be made in which he was much interested. During the evening he partook sparingly of ice-cream, and went home at a little after ten o'clock. His wife, hearing that he was unwell, followed him home; and shortly thereafter he lay down upon a sofa to rest for the night, in a dressing-gown. During the night he was uncomfortable and restless, could not sleep, and, his wife said, "looked miserable and grey." Nevertheless, he went to the office in the morning, but stayed there only a short time, returning in about half an hour. A doctor was called, and found him weak and in pain. He had then had a violent motion of the bowels, and appeared to be generally collapsed. By the

evening his temperature was high and there was further bowel trouble. The case developed into a case of acute enteritis, which would not yield to treatment, and finally caused his death.

The plaintiff alleges that a strain was caused by the exertion of lifting the timber, and that this strain brought about a physical condition which enabled bacteria in the digestive tract to develop to such an extent that death resulted from his inability to resist their attack, by reason of the reduced vitality following the strain in lifting the timber.

At the trial I admitted in evidence, against the protest of the defendants' counsel, the statement made by the deceased to his partner Selby, shortly after he had lifted the timber, that he thought he had hurt himself. It is argued that, apart from this, there is no evidence of the existence of a strain. The medical men stated that there was no physical condition indicating a strain; that the injury, if it existed, was internal only; and that the only knowledge they had of its existence would be from statements made to them by the patient of his symptoms, and the history of the case. The symptoms made it quite plain that the malady was caused by the invasion of the system by pernicious bacteria. This invasion, in the opinion of the doctors, might well be occasioned by any injury to the system which rendered it unable to manifest the normal resistance of a healthy and uninjured individual; but the result might follow equally from anything which would bring about a marked reduction of vitality, or it might follow from the introduction of pernicious bacteria in the food taken—the latter being the general origin of such a malady. The ice-cream taken the evening before, if impure or tainted, would adequately account for the condition found.

It, therefore, becomes a matter of great importance to examine the propriety of my ruling. In *Garner v. Township of Stamford* (1903), 7 O.L.R. 50, the Divisional Court had to consider the admissibility of the statement made by the deceased when she was discovered a short time after an accident upon a highway. Her statement was made in reply to a question as to the cause of the injury. The statement was tendered as being part of the *res gestæ*, but was rejected; because the rule there

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invoked only makes statements admissible when they are involuntary exclamations at the time of the accident, and does not warrant the reception of statements or exclamations made after there has been time for reflection.

*Gilbey v. Great Western R.W. Co.* (1910), 102 L.T.R. 202, is a later decision of the Court of Appeal, perhaps somewhat closer to this case. Compensation was claimed in respect of an accident under the Workmen's Compensation Act. It was alleged that the deceased, while carrying a side of beef, so strained himself as to cause an injury to his lungs. The *post mortem* examination disclosed a tear in the lung and made it plain that this brought about death. The Judge of the County Court admitted in evidence the statements of the workman to his wife, not merely of his sensations and of his feelings, but as to the cause and occasion of the injury from which he was suffering. In the judgment of the Court of Appeal the principle applicable here is pointed out. Cozens-Hardy, M.R., says: "I do not doubt at all that statements made by a workman to his wife of his sensations at the time, about the pain in the side or head, or what not—whether those statements were made by groans or by actions or were verbal statements—would be admissible to prove the existence of those sensations. But to hold that those statements ought to go farther and to be admitted as evidence of the facts deposed to is, I think, open to doubt; such a contention is contrary to all authority."

The Irish Court of Appeal, *Wright v. Kerrigan*, [1911] 2 I.R. 301, had before it a claim under the Workmen's Compensation Act, where part of the evidence tendered was a statement of the deceased to a doctor as to how the injury was received. Cherry, L.J., mentions this evidence, saying: "Hearsay evidence is in some cases admissible, and the learned Recorder appears to me to have acted strictly in accordance with the settled rules of evidence. . . . He ruled out statements as to the circumstances of the accident. He admitted the statements made by the deceased man to his medical attendant . . . as to his symptoms *and their cause*. Such statements are usually held to be admissible upon the ground that there is no other means possible of proving bodily or mental feelings than by the statements of the person who experiences them."



In *Amys v. Barton*, [1911] W.N. 205, the accuracy of this statement of the law was canvassed by the Court of Appeal, and Cozens-Hardy, M.R., pointed out that the words "and their cause" in the statement by Cherry, L.J., could not be supported, but appeared to approve of the rule as stated, with this exception.

In the 9th edition (1910) of Powell on Evidence, p. 358, the admissibility of statements for the limited purpose of proving the physical condition of the person making the statement is asserted; and I think for this purpose the evidence was properly admitted, and it is sufficient to establish that, shortly after the deceased had been engaged in lifting the timber, he had, as he said, indications that he had been hurt.

The statement, perhaps, did not go so far as to indicate that the lifting of the timber was the cause of the injury; but I think that this is an inference which may be drawn from the fact of the injury, and falls within the principle indicated in *Richard Evans & Co. Limited v. Astley*, [1911] A.C. 674, 678, where it is said: "The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable cause is that for which he contends, and there is anything pointing to it, then there is evidence for a Court to act upon. Any conclusion short of certainty may be mis-called conjecture or surmise, but Courts, like individuals, habitually act upon a balance of probabilities." See also the decisions of the Supreme Court of Canada in *McKéand v. Canadian Pacific R. W. Co.*, not yet reported, and in *Grand Trunk R.W. Co. v. Griffith* (1911), 45 S.C.R. 380.

Acting upon this principle, I find that the symptoms indicate that the deceased, at this time, did suffer an injury in lifting the timber in question; and I further find that this injury was the cause of his death. I believe this to be the cause, because, as I understand the medical evidence, it is a possible cause, and it is the only one of the several possible causes which is shewn to have actually existed. There is no evidence that the ice-cream eaten was tainted; and the evidence satisfies me that up to the happening of the accident the deceased appeared to be in perfect health. This brings the case within the decision

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of the Court of Appeal in *In re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591.

It is, therefore, necessary to consider the other matters dealt with upon the argument.

The policy, issued in 1902, contains provisions and stipulations as to notice which, it is admitted, were not complied with, and which are made conditions precedent to the right to recover.

The plaintiff contends that the terms of this policy are not binding upon her, because the renewal receipt, as it is called, constitutes a new contract of insurance; and, by sec. 144 of the Insurance Act, R.S.O. 1897, ch. 203, "the terms and conditions of the contract" not having been "set out by the corporation in full upon the face or back of the instrument forming or evidencing the contract," "no term of, or condition, stipulation, warranty or proviso, modifying or impairing the effect of any such contract made or renewed after the commencement of this Act shall be good and valid, or admissible in evidence to the prejudice of the assured or beneficiary."

Is this a new contract within the meaning of the statute? The original contract, unlike many insurance policies, does not contemplate any renewal. It is an insurance for one year, and one year only; and, upon the principle acted upon by the Court of Appeal in *Carpenter v. Canadian Railway Accident Insurance Co.* (1909), 18 O.L.R. 388, the contract evidenced by the renewal receipt is to be regarded as a new insurance, depending entirely upon a new agreement between the parties. I do not think that this is at all in conflict with *Liverpool and London and Globe Insurance Co. v. Agricultural Savings and Loan Co.* (1903), 33 S.C.R. 94, where the decision of the Court of Appeal, *Agricultural Savings and Loan Co. v. Liverpool and London and Globe Insurance Co.* (1901), 3 O.L.R. 127, is reversed.

This new contract is, according to the terms of the receipt, a contract of insurance for a year "according to the tenor of policy 565996."

Referring in the first place to the statute itself, the intention of the Legislature appears to be plain. The contract to insure is to stand, but it is to be purged of all terms and conditions modifying the primary contract in the interest of the company

and to the prejudice of the insured, unless the terms are set out upon the face or back of the instrument evidencing the contract. "Instrument" must be understood, in the light of the Interpretation Act, as meaning "instrument or instruments;" and the contention of the company is, that the reference in the receipt to the original policy constitutes it one of the instruments forming or evidencing the contract, and that its terms are, therefore, binding; and, in the alternative, that the reference to the former policy is a sufficient compliance with the Act. The contention of the assured is, that the Legislature intended to render insufficient a mere reference to some other document in which the terms of the insurance are to be found, and to require the whole contract to appear on the face of the single sealed or written instrument which forms or evidences the contract. This argument is much fortified by sub-clauses (a) and (b), which expressly permit the application and the rules of friendly societies to be embodied in the contract by reference.

The cases I find to be very difficult. In *Venner v. Sun Life Insurance Co.* (1890), 17 S.C.R. 394, the statute under consideration was the Dominion Insurance Act, R.S.C. 1886, ch. 124, sec. 27. This provided that "no condition, stipulation or proviso modifying or impairing the effect of any policy . . . shall be good or valid unless such condition, stipulation or proviso is set out in full on the face or back of the policy." There the policy had been issued "upon the representations, agreements and stipulations" contained in the application; and the Supreme Court held that the section in question could not be relied upon as an answer to a claim that the policy was void by reason of misrepresentation contained in the application.

It is difficult to see how it could be thought that the section had anything to do with the question whether the contract had been obtained by fraud. Mr. Justice Taschereau, in the course of his judgment, does not pass upon this point, but says that, if applicable, the stipulation in the application "is in express terms referred to in the body of the policy, so that the appellant cannot invoke against the company section 27." None of the other Judges referred to the point: Mr. Justice Gwynne giving reasons; the other three Judges simply agreeing that the appeal should be dismissed.

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In *Jordan v. Provincial Provident Institution* (1898), 28 S.C.R. 554, the appeal was from Ontario, and the statute under consideration was the Ontario Act, 55 Vict. ch. 39, sec. 33. This statute modified in some important respects the earlier Ontario Act, 52 Vict. ch. 32, sec. 4 (which was in practically the same words as the Dominion statute) and is identical with the present Ontario Act (sub-sec. (b) having been added in 1895 by 58 Vict. ch. 34, sec. 5, sub-sec. 10). The policy was in substantially the same form as that under consideration in the *Venner* case. It was issued in consideration of the statements contained in the application. There was material misstatement. The judgment of the Supreme Court is given by Sedgewick, J., who says: "We consider that the Ontario Insurance Act of 1892, section 33, sub-section 1, was complied with in the present case, following, as we do, the decision in the case of *Venner v. Sun Life Insurance Co.*"

This precludes my independent consideration of the question, as I think it is an authoritative statement that, notwithstanding the provision of the Act, the section in question is complied with when the document relied upon is referred to and sufficiently identified in the contract. Had the Supreme Court not seen fit to place its judgment upon this ground, I should have thought it apparent from the terms of the statute that the application might be identified by reference, and that this express provision found in clause (b) went far to indicate that this was intended to be an exception to the general rule.

The question again rose in *Hay v. Employers' Liability Assurance Corporation* (1905), 6 O.W.R. 459, where Mr. Justice Osler says: "Whatever other construction we might have felt ourselves at liberty to place upon sec. 144, sub-sec. (1), of the Ontario Insurance Act, R.S.O. 1897, ch. 203, we are now bound by the decisions of the Supreme Court of Canada . . . to hold that the plaintiffs' proposal and the statements therein contained are, by reference thereto in the policy, sufficiently incorporated therewith and set out in full therein, within the meaning and requirements of the . . . section." And in *Elgin Loan and Savings Co. v. London Guarantee and Accident Co.* (1906), 11 O.L.R. 330, this statement is adhered to.



I cannot see any ground upon which I should be justified in attempting to distinguish the case in hand from what is said in the authorities referred to. These cases, as I have already pointed out, might have been rested upon the fact that the application is, by clause (b), excepted from the more general provision of the section; but the Court has deliberately refrained from placing its decisions upon this ground, and has preferred to adopt a construction of the clause which, I fear, has had the effect of nullifying the intention of the Legislature. If I am right in this, it is admitted that the plaintiff's action fails; and it is not necessary to consider the other questions argued.

The action is dismissed without costs.

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[IN CHAMBERS.]

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*Trial—Action to Establish Will—Judicature Act, sec. 103—Application for Order for Trial by Jury—Refusal—Discretion—Leave to Appeal—Practice.*

An action to establish a will, transferred from a Surrogate Court to the High Court, is one within the former exclusive jurisdiction of the Court of Chancery, within the meaning of sec. 103 of the Judicature Act, R.S.O. 1897, ch. 51; and is, therefore, to be tried without a jury, unless otherwise ordered.

In the circumstances of this case, a Judge in Chambers refused to make an order for trial by jury; and another Judge refused leave to appeal to a Divisional Court.

Review of the legislation and practice.

*Re Lewis* (1885), 11 P.R. 107, approved and followed.

MOTION by the defendant Campbell for an order directing that the issues in this action be tried by a jury.

March 15. The motion was heard by FALCONBRIDGE, C.J.K.B., in Chambers.

*R. McKay*, K.C., for the defendant Campbell.

*E. C. Cattanach*, for the plaintiffs.

*J. R. Meredith*, for the infant defendants.

March 18. FALCONBRIDGE, C.J.:—The action concerns the validity of the will of the late Charles Bugg. The plaintiffs, the executors named in it, propounded it for probate in the Surro-

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gate Court of the County of York. The defendant Campbell, the only surviving child and heir-at-law of the deceased, contested probate, upon the ground that the will was not duly executed, and that the testator had not testamentary capacity; also upon the ground that the execution of the will was obtained by the undue influence of the plaintiffs' who are not only executrices but residuary legatees under the will, and who beneficially take the greater portion of the testator's estate, which is very large. The proceedings were transferred from the Surrogate Court to the High Court, and the order of transfer reserved to any party the right to apply for a trial with a jury.

In *Re Lewis* (1885), 11 P.R. 107, Ferguson, J., determined that a probate action, transferred from a Surrogate Court to the High Court, was a matter over which the Court of Chancery had, at the time of the passing of the Judicature Act, exclusive jurisdiction; this being at that time the criterion upon which the right to demand a jury by a mere jury notice depended, as well as the criterion as to the mode of trial pointed out by sec. 45 of the Judicature Act of 1881.

Prior to that statute, Surrogate Court proceedings could be transferred to the Court of Chancery, and became subject to the general provisions of the Chancery Act, which contained a provision authorizing an order directing a trial by jury.

By the section in question, in cases in which the Court of Chancery had exclusive jurisdiction, "the mode of trial shall be according to the present practice of the Court of Chancery."

In the revision of 1887 (R.S.O. 1887, ch. 44, sec. 77) this section was recast, and assumed the form in which it is now found, as sec. 103 of the Judicature Act, R.S.O. 1897, ch. 51, which provides that "all causes, matters, and issues, over the subject of which prior to the Administration of Justice Act of 1873, the Court of Chancery had exclusive jurisdiction, shall be tried without a jury, unless otherwise ordered." The change of date from 1881 to 1873 is in this case immaterial, because the provision of the Surrogate Courts Act relating to transfer of causes to the Court of Chancery is found in the Consolidated Statutes of 1859.

As is pointed out in *Re Lewis*, the legislation here and in England upon this point has proceeded upon widely differing

lines. The right of the heir-at-law in England to have the issue *devisavit vel non* tried by a jury was long carefully preserved to him; but here the result of our legislation is, that *primâ facie* the action "shall be tried without a jury," and the onus is upon the party seeking to have a jury to shew a case justifying it being "otherwise ordered."

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In this case everything points to the desirability of a trial without a jury. There will be many witnesses—it is said some 125—and as many experts as the law or the trial Judge may allow to be called. The trial, it is said, will take two weeks. The circumstances of the case are such as to make it unlikely that the mind of the jury can be concentrated upon the real issue. As said in the case already referred to, "the cause can properly and fitly be disposed of in the ordinary way without the intervention of a jury."

Motion dismissed—costs in the cause.

The defendant Campbell moved for leave to appeal to a Divisional Court from the order of FALCONBRIDGE, C.J.K.B.

March 22. The motion was heard by BOYD, C., in Chambers.  
*G. Grant*, for the applicant.

*I. F. Hellmuth*, K.C., for the plaintiffs.

*J. R. Meredith*, for the infant defendants.

March 25. BOYD, C.:—This application seeks to unsettle the practice and course of procedure by going back to one of the earliest statutes of old Upper Canada. Yet, even in England, the statute law of which was, so far as applicable to the condition of this Province, adopted in 1791, the course of practice was not to regard the claim of the heir-at-law to have an issue tried before a jury as an absolute right, but one to be dealt with according to the circumstances. Thus in *Man v. Ricketts* (1844), 7 Beav. 93, 101, Lord Langdale declined to direct such an issue, the will having been otherwise sufficiently proved as against the heir. Indeed, the real reason why the trial at law, and therefore by a jury, was granted in England, was because of "the frail and imperfect manner of examining into facts" then possessed by the Court of Chancery. The words are those of Lord Erskine

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in *White v. Wilson* (1806), 13 Ves. 87, at p. 91. This case is cited by Ferguson, J., and the wrong volume given in *Re Lewis*, 11 P.R. 107, at p. 108; and it is now not to be questioned that such a reason does not exist in Ontario, where all Courts alike have the fullest power and the most searching method of investigating facts. The old course in England was to file a bill for the purpose of establishing the will as against the heir with regard to realty. Then there would be a hearing of such evidence as was admissible in equity practice; and, if a sufficient *primâ facie* case of proof was made out, then an issue would be directed (*devisavit vel non*) in order to establish conclusively as against the heir the fact of a valid will made by a competent testator. See the course pursued in *Waters v. Waters* (1848), 2 DeG. & Sm. 591, 599.

The English practice grew out of historical reasons. Until the Probate Court Act of 1857, 20 & 21 Vict. ch. 77, there was no jurisdiction to admit a will of land to probate. The only mode of testing the validity of such will was by an action of ejectment between the heir and the devisee. But in our practice the probate of will includes realty and personalty: realty is becoming more and more assimilated to personalty: with us the unique distinction of heir-at-law never obtained, for all children shared equally. All the reasons which necessitated (almost) a jury trial as against the heir-at-law in England, never existed here; and our practice is settled, whether the contest be in the lower Court or upon the removal of the contention to the High Court, that the trial of fact by jury is a matter for the sound discretion of the Court or a Judge: R.S.O. 1897, ch. 59, sec. 22\* and sec. 35. These sections are conclusive as against any vested and absolute right of the heir to insist on a trial by jury.

The practice was well settled by a very careful Judge in 1885, in *Re Lewis*, 11 P.R. 107; and I see no reason to doubt the correctness of the order of the Chief Justice of the King's Bench, or to doubt that he wisely exercised his discretion, having regard to the issues raised and their magnitude and the complexity likely to arise in trying to sever the methods of trial in investigating the facts of this controversy.

I disallow leave to appeal; and costs of the executors and other beneficiaries opposing should be paid out of the estate.

\*See now 10 Edw. VII. ch. 31, sec. 28.



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*Will—Construction—Conditional Gift—Revocation upon Non-fulfilment of Condition—Distribution among other Legatees Named in Will—Legatee Named in Codicil—Status of, to Question Fulfilment of Condition—Substantial Performance of Condition—Cy-près Doctrine.*

A codicil forms part of the will or testamentary instrument, but not necessarily to all intents and purposes.

The testator, by his will, gave the bulk of his property to his two nieces, but upon a certain condition, to be fulfilled in his lifetime, and which was not made known to them until after his death; and, in the event of their not fulfilling the condition, he revoked the devises and bequests to them, and directed that "their shares be distributed equally among the other legatees named in this my will." A year and a half later, he executed a codicil, by which he gave a small legacy to the plaintiff, who was not named or referred to in the will. The codicil did not in terms say that it was made part of the will, but it confirmed the will and gave other pecuniary legacies to persons not named in the will. After the testator's death, the executor, deeming that the condition had been fulfilled, turned over to the two nieces the property bequeathed to them. The plaintiff, on her own behalf and not representing any other possible claimants, sued the executor and the two nieces for an account and a share of the property transferred to the nieces, alleging that they had not fulfilled the condition, and that she (the plaintiff) was entitled as one of the other legatees named in the will:—

*Held*, that the plaintiff, being a legatee only by virtue of the codicil, was not one of the legatees contemplated in the will, and had no *locus standi* to question the conduct of the executor in making over the property to the two nieces.

*Henwood v. Overend* (1815), 1 Mer. 23, and *Hall v. Severne* (1839), 9 Sim. 515, followed.

*Semble*, that there had been a substantial performance of the condition by the nieces; and, by the application of the *cy-près* doctrine, the condition had been practically satisfied.

ACTION for construction of the will of George Baker; for an accounting by the defendant the executor; to recover from the defendants the Misses Baker the moneys and property of the estate transferred by them to the executor; and for administration.

March 20. The action was tried before BOYD, C., without a jury, at Stratford:—

*R. S. Robertson*, for the plaintiff.

*F. H. Thompson*, K.C., for the defendants.

March 25. BOYD, C.:—The testator gives the bulk of his property to his two nieces, who are, with the executor, defendants, upon this condition:—

"Upon their remaining with me as my housekeepers at all times (unless I consent to one or both of them going out) during

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the remainder of my life and during that time rendering me faithful service and giving me all necessary and proper attention and all proper care and nursing in case of illness or in case I should become feeble and should they fail in those respects or any of them I hereby absolutely revoke the said devise and bequests to them and direct that in lieu thereof my executors shall pay to my said niece Sarah Elizabeth Baker the sum of two hundred dollars only and I direct that their shares be distributed equally among the other legatees named in this my will."

"And I hereby further declare notwithstanding anything hereinbefore contained that it is not my will or intention that it shall be compulsory for both of my said nieces to remain with me at all times but that it will be sufficient if one of them is with me when I am in my usual health and that both of them shall be present when I require the services of both and so notify them."

The will was made in February, 1907; a codicil was added giving the legacy of \$100 to the plaintiff under the name of Ellen Hamilton—she not being named or referred to in the will—codicil dated in September, 1908. The testator died on the 27th September, 1910. His wife died in 1906, and he had no children. I am not clear as to his age, but I think it was about eighty. The nieces did not know of the terms of the condition or of anything that was in the will—nor did any one, according to the evidence, but the solicitor who drew it (who was not called as a witness). The nieces, however, lived with him and cared for him, as it turned out, according to the terms of the condition, however strictly construed, from before the date of the will and just upon the death of his wife, until the 19th July, 1909, when a change in his health and habits became very apparent, which had begun about the date the physician was summoned during February, 1909; then, at his instance, more competent assistance was called in, under the supervision of the nieces, and this state of domestic affairs continued until his death.

Then first became known the condition expressed in the will; and, on a review of and with knowledge of all that was detailed before me in evidence, the executor paid over or turned over to the two beneficiaries the property now claimed (in part) by the plaintiff. The plaintiff, as she testified, sues on her own behalf

solely, and is not joined by and does not represent any other possible claimants under the will.

I expressed my opinion as to the effect of the evidence at the close of the argument, but reserved judgment generally. I now deal first with the right of the plaintiff to maintain this action.

In *Henwood v. Overend* (1815), 1 Mer. 23, the residue was to be divided "amongst the several legatees in proportion to the several sums of money bequeathed to them by this my will." By a codicil specified "to be added to and taken as part of" the will, other legacies were given to other legatees. Sir William Grant, M.R., held that the legatees under the codicil were excluded from sharing in the residue; and that the words "by this my will" were not less strong than the words "hereby" and "hereinafter," which were so restrictively construed by the Lord Chancellor in *Bonner v. Bonner* (1807), 13 Ves. 379.

Sir William Grant's decision was approved and followed by Shadwell, V.-C., in *Hall v. Severne* (1839), 9 Sim. 515, where the residue was to be proportionably divided among "the hereinbefore mentioned legatees;" and in a codicil, which he declared to be a part of his will, he gave other legacies to other persons and also additional legacies to those who were legatees in the will. It was held that none of the legatees under the codicil were to share in the residue in respect of their legacies under the will. The Vice-Chancellor declined to follow the case of *Sherer v. Bishop* (1792), 4 Bro. C.C. 55, in which Lord Commissioner Eyre said that a codicil was a part of the testamentary disposition, though not part of the instrument, and on this ground that the residue should be divided among legatees (described as "such relations only as are mentioned in this my will") and other legatees, also being relations, named in the codicil; the two other Lords Commissioners, Ashhurst and Wilson, hesitating a good deal at this extension of the word "will" and doubting the construction. Shadwell, V.-C., favoured the opinion of the hesitating and doubting Judges, and characterised that of the Chief Commissioner as "a very extraordinary one." The concurrence of opinion in two such Judges as Grant and Shadwell, both skilled in questions of construction, may well be followed without hesitation. The words used in this will are identical with those used in the case in 1 Mer.

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Looking at this will *per se*, I would not think the testator's meaning to be doubtful. He directs that the property intended to be given to his two nieces, which, upon their default in certain conditions, is to be revoked, shall then be distributed "equally among the other legatees named in this my will." The codicil does not in terms say that it is made part of the will, as in the *Severne* case, but it confirms the will and gives other pecuniary legacies to persons not named in the will. The obvious meaning, to my mind, is, that the testator named in the will those who are to share equally in the revoked property, and does not intend that the legatees first named in the codicil shall come in to diminish what is given to those named in the will.

It was said in argument that *Hall v. Severne* has been discredited. On the contrary, I find it has not been impeached, but rather upheld. It was followed in *Early v. Benbow* (1846), 2 Coll. 342, and both cases were referred to as authorities by Farwell, J., in *Re Sealy* (1901), 85 L.T.R. 451; and was held to be rightly decided by Sullivan, M.R., in *Donnellan v. O'Neill* (1871), Ir. R. 5 Eq. 523, 532, on the ground that the shares of the residue were fixed by the will, and so were the persons to take them, and there was nothing in the codicil to alter this express gift. And, in addition to all this, it was followed as late as 1907 by a Divisional Court in *Re Miles* (1907), 14 O.L.R. 241, a decision binding upon me.

There is no doubt of the general principle that a codicil forms part of the will or testamentary instrument, but not necessarily to all intents and purposes. As said by Lord Hardwicke, C., in *Fuller v. Hooper* (1750), 2 Ves. Sr. 242, "the testament . . . may be made at different times and different circumstances, and therefore there may be a different intention at making one and the other."

I hold, therefore, that the present plaintiff, being a legatee only by virtue of the codicil signed and made on the 9th September, 1908, is not one of the legatees contemplated in the will made on the 7th February, 1907. This being so, and as the evidence is that she sues only for herself and in her own behalf, she has no *locus standi* to question the conduct of the executor in paying over the property devised to the two nieces, who take under the terms of the will.



This lessens the importance of the main question as to whether these nieces are entitled to take the property. My impression at the trial was, that, upon the facts, there had been a sufficient compliance with the conditions requisite to their success. I refer to my comments on the evidence at the close of the trial, as follows:—

I do not propose to dispose finally of this case at present; there are legal questions that arise; but upon the evidence I will just say a few words that strike me now.

There are two parts in this will to be regarded. The benefits to the two Baker nieces are conditional “upon their remaining with me as my housekeepers at all times”—I leave out the parenthesis—“during the remainder of my life and during that time rendering me faithful service and giving me all necessary and proper attention and all proper care and nursing in case of illness or in case I should become feeble.” Then there is the clause put in, “upon their remaining with me as my housekeepers at all times (unless I consent to one or both of them going out).” There is a provision there that there may be a remission of the continuous attendance of one of them, or even of both of them—going out from his house, and therefore ceasing to be his housekeepers; and then at the end, which is to be taken as the strongest part of the will, if there is any ambiguity, there is his declaration, “I hereby further declare notwithstanding anything hereinbefore contained that it is not my will or intention that it shall be compulsory for both of my said nieces to remain with me at all times but that it will be sufficient if one of them is with me when I am in my usual health and that both of them shall be present when I require the services of both and so notify them.”

Of course they did not know this. This was entirely in the testator’s breast and in the office of his solicitor, locked up in the will; and neither of these women knew anything about this. Only the testator himself knew what was in it. He knew what was in the will; and, whether or not they were requested, they acted on the terms of this will. It was not compulsory for both of his nieces to remain with him at all times. “It will be sufficient if one is with me when I am in my usual health.” Now, one or other of them was with him continuously, under the strictest terms of the will, while he was in his usual health. I think his

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usual health failed, his usual condition failed, at the time the doctor was called in, in February, 1909, and he degenerated more or less from that time until Mrs. Mutton was called in to take possession as housekeeper in July, 1909. They remained with him during his usual health and down to the time, three days after the time in fact, that Mrs. Mutton came in, and then they were superseded by her as housekeepers; but, I think, the evidence amply justifies the conclusion that—whatever his state of mind may have been from a legal point of view, as to his legal capacity and so on—he had certainly lucid intervals, he was able to understand matters; and, although you could not fully intrust to him the disposal of business, he understood what was going on. I cannot fail to reach that conclusion from the whole of the evidence, the evidence given by Mrs. Mutton herself, as well as the evidence of others. Mrs. Mutton had reasons for knowing, and she tells us that on one occasion, when he was making some objection to signing a cheque, they told him it was to pay Mrs. Mutton, and he signed it. That corroborates what the two women themselves say, that he was aware that they were collecting his income, his rents and so on, and that they were transacting his financial business, that they were paying Mrs. Mutton as housekeeper, and that the niece who had been housekeeper under wages had ceased to receive wages some time before, and that Mrs. Mutton was acting in her stead and she so continued. He was aware of that change; and, I think, it would not be at all unfair to treat that transaction, his knowledge of it, and his consent to it, and his agreeing that Mrs. Mutton should be paid, as an outcome of this parenthetical clause, “unless I consent to one or both of them going out.” They both did go out. They necessarily went out, I think, because of the condition of the man himself, and he in effect consented to their doing so, and consented to the other housekeeper coming and being appointed in their stead. That is the equitable construction to give to the will, of which I think it is susceptible, and I am inclined to think that the evidence would justify it.

Turning to the evidence, it is quite plain from what the doctor said that it was unsafe for those women to stay there any longer. He advised a change. He did so with scientific knowledge and accuracy and judgment required in dealing with such cases. He

did not know anything about the will. He was not actuated one way or the other, but for the best interests of the man himself and of these two women that were there; and he says that it was impossible for those women with any degree of propriety to stay there. It was indelicate and inadvisable; and it was much better in every way that this mature woman, a married woman, should come in; and she proved an admirable success, but they retained the control of affairs; they did not abandon the old man or leave him to the tender mercy of casual strangers, as was said. They were there once or sometimes twice a week. They attended to the operation of shaving him, a confidential performance, and were brought close to him, in touch with him in a most familiar way, so that he was with them all along at intervals, although he knew that they were not there continuously, and in his saner moments he may have appreciated the reason of their not being there; but he was content with the arrangement; he made no objection; he went on and consented to Mrs. Mutton being housekeeper and to their coming in in that way from time to time all through. Now, he knew what the conditions were in his will, and he made no objection to this state of affairs as indicating that they were not carrying out what he intended they should do in order to enjoy this legacy. I rather think, upon the fair construction of the evidence, that there was a sufficient performance within the meaning of the terms of the will, having regard to the flexibility of it and the consent which he might give to both of them being absent. I do not finally pass upon this until I look at the cases, and on the other point as well as this. It may be that the other point is fatal. However that is, I will reserve judgment on the whole case.

True it is that ignorance by the beneficiary of a condition annexed to a gift by will does not protect the devisee from the consequences of not complying therewith: *Astley v. Earl of Essex* (1874), L.R. 18 Eq. 290.

There is a good deal to be said in favour of the view presented by the defendants' counsel that the conduct of the testator, his words and acts in regard to his nieces and in their presence, were so fraught with sexual aberration as to render the requirement of residence with him one *contra bonos mores*, within the meaning of *Brown v. Peck* (1758), 1 Eden 140. This, of course, does not

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appear upon the face of the condition, and requires to be established (as it was established) by the evidence. This conduct would absolve them from continuous residence and would justify their having him cared for, as they did, by a married woman and her husband, who were able to control the testator; so that, in equity, the testator himself worked a discharge of the conditions.

I still think that there was a substantial performance of the condition by the nieces; and, if so, by the application of the *cy-près* doctrine, the condition has been practically satisfied. In Williams on Executors, assent is given to the law found in Story's Equity Jurisprudence, that "where a literal compliance with the condition becomes impossible from unavoidable circumstances, and without any fault of the party, it is sufficient that it is complied with as nearly as it practically can be, or as it is technically called '*cy-près*.'" Williams, 10th ed., p. 1013, note (e).

But, in view of my decision upon the status of the plaintiff, I do not further pursue the inquiry on this branch of the case.

The action should stand dismissed; but I would give no costs against the plaintiff unless she appeals. Costs out of the estate to the defendants in any event.

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HUEGLI v. PAULI.

March 27. *Church—Property Rights—Religious Institutions Act, 36 Vict. ch. 135, secs. 7, 19—Construction—Deed of Conveyance of Church Site to Trustees—Special Trusts not Affected by Statute—Erection of Meeting-house—Subsequent Abandonment—Removal to New Building—Effect as to Continuity of Beneficiary—Sale of Old Site and Building—Resolutions of Congregation—Breach of Trust—Status of Plaintiffs to Complain—Former Members of Congregation—Status of Minister of New Congregation—"Duly Authorised"—Congregational System of Church Government—Class Action—Amendment—Remedy for Breaches of Trust.*

In 1874, a congregation of the Evangelical Lutheran denomination purchased land in the town of Stratford as a site for a house of public worship, and the land was conveyed to trustees for the congregation. The recitals in the conveyance shewed that it was obtained under the powers conferred upon religious societies by the Act then in force respecting the property of religious institutions, 36 Vict. ch. 135 (O.), which provides (sec. 19, now sec. 23 of R.S.O. 1897, ch. 307) that "in every case the special trusts or powers of trustees contained in any . . . conveyance . . . shall not be affected or varied by any of the provisions of this Act." Section 7 of the Act gives power to sell the land



when it becomes unnecessary to be held for the religious use of the congregation, and it is deemed advantageous to sell. The recitals shewed also that a then existing religious society or congregation of Evangelical Lutherans had occasion for the land purchased and conveyed as a site for a house of public worship, and had appointed three persons (the trustees to whom the conveyance was made) to hold in perpetual succession, under the name of "The Trustees of the Stratford Evangelical Lutheran Church," for the use of the said society and upon the trusts thereafter set forth. There were two special trusts: first, that the premises should be forever thereafter held for the use of the members of an Evangelical Lutheran Church; and, second, "that the trustees shall at all times hereafter permit any minister, he being duly authorised by the said Evangelical Lutheran Church to conduct the worship thereof, to officiate in the church existing or which may hereafter be built on the said lot according to the ritual . . . of the said church, and shall also apply the rents and profits derived from any portion of the said lot or the buildings erected thereon towards the maintenance of public worship in the said church or meeting-house, according to the rules . . . or towards the repairs or improvement of the said property, and to no other purpose whatsoever." The conveyance also provided that when the church for which the "trust was created shall lose its visibility and cease to exist," the control of the property should pass over to and vest in the nearest Evangelical Lutheran Church of the same faith and order. The original society built and took possession of a meeting-house on the land so conveyed, and occupied the place for religious uses until December, 1908; when the congregation moved into a new building upon another site, it having been previously resolved (practically unanimously) by the congregation, at meetings held for the purpose, that a new lot should be bought and a new building put up, and that the old lot and building should be sold. After vacating the old site, the trustees, acting on the direction of the congregation, rented the old building, and applied the surplus of rent, after paying taxes and insurance, for the benefit of the congregation and of the new site. The trustees also, in like manner, sold four feet of the land, and were offering the rest for sale. In February, 1911, the plaintiffs and others began a movement for the establishment of a new congregation of Evangelical Lutherans in Stratford. One of the plaintiffs was a dissident member of the original society, the only one who had objected to the purchase of the new site and the sale of the old; and another (the plaintiff H.) was a minister of the denomination in good standing, who had been called to Stratford for the purpose of organising the new movement. He became the pastor of a new society, worshipping in a hall; and this newly organised body, containing a few members of the original society, applied for leave to enter upon the old site; and, that being refused, in February, 1912, brought this action against the trustees of the new site and building (the successors of the original grantees), claiming and practically admitted to be the legal owners of the old site, for a mandatory order upon the defendants to enforce the re-opening of the old building for public worship, and to allow the plaintiff H. to conduct public worship therein, and for a declaration to have the trusts of the deed carried into execution, and to have the sale stayed and the rents applied under the trust to the old site:—

*Held*, that the situation, provided for in the deed, of the church for which the trust was created losing its vitality and ceasing to exist, had not arisen: the vacating of the old site was not equivalent to the cesser of existence of the beneficiary.

*Held*, also, that the effect of sec. 19 of the Act (now sec. 23) is to forbid the nullification of the special trusts of the deed; and, by the terms of the deed, the land was acquired for the possessory use and benefit of the congregation, and was to be maintained and improved in perpetuity; the trust inhered in the title, and so passed to the successive trustees indefinitely *in futuro*—not to be interrupted by a sale out and out.

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*Held*, however, that, as the organisation of the church described in the deed was upon the Independent or Congregational system, the view of the majority prevailed; the organised body had power to change the place at which its services should be conducted and to change its name; the resolutions to vacate the old site and to sell or rent it were matters of congregational competence, and were conclusive as against the plaintiffs. The identity of the beneficiary church was established in favour of the body represented by the defendants; and such of the plaintiffs and those whom they represented as were members of the original body, had, by leaving it, ceased to be a part of it, and had no right as former members to claim any part of the trust property.

*Held*, also, that the plaintiff H., although in good standing as a minister of the general body, was not one "duly authorised by the said Evangelical Lutheran Church to conduct the worship thereof:" the context shewed that the source of authority was to be sought, not in the denomination at large, but in the particular body or church representing the original congregation.

*Held*, also, that no amendment enabling the plaintiffs to sue on behalf of others who sympathised with them—which was essential in order that no incongruity in the class represented might arise—would better the cause of action; the legal title was in the defendants, and no breach of trust had arisen in regard to which the plaintiffs had a right or an interest to complain.

*Semble*, that the defendants' breaches of trust might be investigated by the intervention of the Attorney-General and a competent relator.

ACTION for a mandatory injunction requiring the defendants, the trustees of an Evangelical Lutheran Church in the town of Stratford, to reopen for public worship their disused church-edifice, and to allow the plaintiff Huegli to conduct services therein; for a declaration that the plaintiffs were entitled to have the trusts of the deed of the land upon which the building stood carried into execution; for an injunction restraining the defendants from leasing or selling the building or the land and from using or allowing it to be used for purposes other than those declared in the trust deed; and for other relief.

March 20 and 21. The action was tried before BOYD, C., without a jury, at Stratford.

*F. H. Thompson*, K.C., for the plaintiffs.

*R. S. Robertson*, for the defendants.

March 27. BOYD, C.:—This is a church case, not involving questions of doctrine, but only those of property. All the litigants are of the Evangelical Lutheran denomination, holding the doctrines set forth in the unaltered Augsburg Confession, and both parties claim conflicting rights under one and the same deed of trust.

The plaintiffs' statement of case appears simple; but, upon

the development of the facts at the trial, questions arise of difficult and complicated character which have not been considered by our Courts. I do not purpose to deal with more than are necessary to determine this action. Three plaintiffs are on the record, but at the hearing they asked leave to sue "on behalf of others." An initial difficulty arises as to "who are the others?" That remains as yet undefined. The defendants are alleged to be and are the trustees of the legal estate in the church property in question, and breaches of trust are complained of. No doubt, the rule is well settled that a member of the society may sue on behalf of himself and all the members of that society to prevent a breach of trust; or it may be that, if he stands alone, he may sue in his own name for an injunction; but it must appear that he has a legal interest to intervene. So I pass for the present from the question of parties and the *locus standi* of the plaintiffs.

The trust property was acquired in July, 1874, by conveyance in fee simple from Alexander Grant, of Stratford, for an expressed consideration of \$200. The conveyance is made to three persons appointed to be trustees (under the statute then in force, 36 Vict. ch. 135(O.), respecting the property of religious institutions), for the purposes therein set forth. The recitals shew that a then existing religious society or congregation of Evangelical Lutherans had occasion for the land purchased and conveyed as a site for a house of public worship, and had appointed three persons to hold in perpetual succession, under the name of "The Trustees of the Stratford Evangelical Lutheran Church," for the use of the said society and upon the trusts thereafter set forth.

There are two "special trusts" (to use the phrase of the deed): first, that the premises shall be forever hereafter held for the use of the members of an Evangelical Lutheran Church, which shall be exclusively composed of persons holding the doctrines of the said Augsburg Confession; and, second, "that the trustees shall at all times hereafter permit any minister, he being duly authorised by the said Evangelical Lutheran Church to conduct the worship thereof, to officiate in the church existing or which may hereafter be built on the said lot according to

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the ritual . . . of the said Church, and shall also apply the rents and profits derived from any portion of the said lot or the buildings erected thereon towards the maintenance of public worship in the said church or meeting-house according to the rules . . . or towards the repairs or improvement of the said property, and to no other purpose whatsoever."

It is to be noted that the word "church" is used in two senses in different parts of the conveyance; at times referring to the religious society, and again to the particular meeting-house on the premises.

The recitals shew that the conveyance was obtained under the powers conferred upon religious societies by the provincial statute then in force, 36 Vict. ch. 135, sec. 19, which provides that "in every case the special trusts or powers of trustees contained in any deed, conveyance, or other instrument, shall not be affected or varied by any of the provisions of this Act." That clause is carried into the latest revision of the same Act (R.S.O. 1897, ch. 307, sec. 23). This Act gives power to sell the land when it becomes unnecessary to be held for the religious use of the congregation, and it is deemed advantageous to sell, etc.: sec. 7 of 36 Vict. ch. 135.

This original society built and took possession of a meeting-house on the said land, and occupied the place for religious uses down to the 13th December, 1908, when the premises were vacated under the following circumstances.

The congregation was growing from year to year, and it became a question whether the old building should be repaired and extended or another site should be procured and a new building erected.

By the record in the church minutes it was, on the 17th December, 1906, resolved unanimously that a new church should be erected. There was some fluctuation of opinions and of resolutions as to the *locus*; but finally it was moved and carried at a meeting of the congregation held on the 24th January, 1908, that a new lot should be bought, and on the 28th August of the same year that the old lot should be sold. This vote also appears to be practically unanimous, only one person (who is one of the plaintiffs, Altstadt) voting "nay."

The new building being put up on the new lot, the congrega-



tion as a whole took possession of the new building, in Erie street, on the 13th December, 1908, when the new meeting-house was formally opened. There does not appear to have been what is called a "split" in the society. Some members may have been reluctant or inert, but only the one who voted "nay" upon the question of sale is in evidence as being actively dissident. The pastor of the society that moved into the new building says, "Practically the whole congregation went with me." He names the plaintiff Allstadt as the only exception. Another plaintiff, Racey, was active in support of the new movement, and voted in favour of it at the meeting.

After vacating the old site, the trustees, acting on the direction of the congregation, rented the building thereon, and applied the surplus of rent, after paying taxes and insurance, for the benefit of the congregation and of the new site. The trustees also, in like manner, sold four feet of the land, and are now offering the rest for sale. The trustees of the Erie street lot (now defendants) claim to be the legal owners of the old site; and this is not in effect questioned by the plaintiffs in the present case. The object of the suit is to restrain the sale and to get a right of entrance to the old building (which is in Cambria street) in order to make use of it for religious services, in the interest of a body of people represented by the plaintiffs. This movement in regard to the new body began in February, 1911, by the forwarding of a petition with twelve signatures to the plaintiff Huegli, who is an Evangelical Lutheran clergyman of the Synod of Missouri, and in good standing as a member of that Synod, inviting him to take up ministerial work in Stratford. He came, and a hall was rented on Downey street, and there he began to organise a congregation, and was joined by the plaintiffs Racey and Allstadt and two or three others who had been members of the congregation worshipping in Cambria street, and also by some outsiders, aggregating in all about twenty members—the whole number of present adherents in Downey street hall being about one hundred.

To go back now to an analysis of the petitioners and their standing in the Cambria street church at the time it was resolved to build a new meeting-house on another site, we find

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that five of these were not members of the old church; one, Hembruch, was not in good standing since 1906, and had no right to vote in the old church; and of the remaining six, Homan attended the Erie street meetings for a while; Schroeder subscribed for the building of the new church, and became liable on the bond for its debt, and also attended at Erie street for a while; Wolf subscribed towards the new building and went over with the majority; Redding is now a member of the Erie street church and in good standing (*i.e.*, making his payments, etc.); Racey went over with the rest to Erie street church, and, as has been stated, was an active advocate of the change; and the last of the twelve, Allstadt, is the only one who has opposed and stood aloof from the new movement.

The situation as it has been developed is not provided for in the four corners of the deed of trust. Only two conditions are there dealt with: (1) when all is going on in due course by the occupation and religious use of the trust property by the congregation of the Stratford Evangelical Lutheran Church; and (2) when the church for which the "trust was created shall lose its visibility and cease to exist"—then the control of the property is to pass over to and vest in the nearest Evangelical Lutheran Church of the same faith and order.

The action is framed on the theory that this second situation has arisen—by assuming that the vacating of the old site is equivalent to the cesser of existence of the beneficiary. This proposition cannot, it seems to me, be sustained. The church in possession under the deed of trust has, for sufficient reasons, decided no longer to remain on the trust property; and the question as to what is to be done with that property cannot be solved by reference to this latter provision in the deed of trust.

The newly organised body, containing a few members of the former church society, has applied for leave to enter upon the old site, by notice about the 12th April, 1911; and, failing to get satisfaction, this action is brought on the 1st February, 1912, seeking a mandatory order on the defendants to enforce the reopening of the church and to allow the plaintiff Huegli to conduct public worship therein, and for a declaration to have the trusts of the deed carried into execution, and to have the sale stayed and the rents applied under the trust to the old site.

By the terms of the deed, the land is held on the special trusts that the same shall be forever held and enjoyed for the use of the members of an Evangelical Lutheran Church, and that the rents, etc., shall be applied to repairs and improvement of the said property, and to no other purpose whatsoever.

The plaintiffs' broad contention is, that the lands cannot be sold and that the rents (if any) cannot be diverted from the perpetual purpose of repairing and improving the trust property. They claim to represent some of the beneficiaries, being members of the original congregation for whose use and benefit the trust was created, and that the majority cannot by any vote or action overrule and extinguish their rights and claims.

The broad contention of the defence is, that there is no private right of action; that the beneficiary is the society or congregation, and not any individuals of it; and that the society as a whole is represented by the Erie street church. As to the sale and the application of the rents, they invoke the benefit of the statute referred to in the deed; and say that, even if the rents were misapplied, it is a grievance to be complained of by the Attorney-General, and not by the plaintiffs.

This Act, no doubt, provides for the sale and leasing of church lands when it becomes unnecessary to retain them for religious use, upon the consent being obtained of a majority of the members present at a meeting duly called for that purpose; and, so far as all necessary preliminaries are concerned, this place may well be sold or leased if the Act applies. But the plaintiffs rely on sec. 19 of the Act (sec. 23 of the present Act), which provides that in every case the special trusts or powers of trustees contained in any deed shall not be affected or varied by any of the provisions of the Act. In this deed we find expressed as "special trusts:" (1) that the land shall be forever hereafter held and enjoyed for the use of the members of an Evangelical Lutheran Church; and (2) that the rents and profits derived from any portion of the said parcel of ground or the building erected thereon shall be applied towards the maintenance of public worship in the said church or meeting-house, towards the repairs and improvement of the said property, and for no other purpose whatsoever. This last special trust is

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peculiarly emphatic in being impressed on the very place and the building (the meeting-house) thereon.

Unless I can nullify these special trusts, the land cannot be sold or the rents diverted to another place. And, as I read the statute, it forbids the nullification of these special trusts. The effect of this statute has not been considered; I believe, by the Courts in the aspect now presented. The aim of the Legislature appears to be to give a right of alienation to a religious body holding lands by trustees capable of perpetual succession. The statute leaves out cases of special trust and deals with lands held by the corporation on the general trust or obligation of using the property for the purposes contemplated at its creation.

Apart from special restraining trusts, when the body outgrows its building, and the majority decide that it has become necessary and advantageous to dispose of the property with a view of removing to a more convenient situation, then the statute promotes the benefit of the body by sanctioning such a course; and a sale so had, which is a conversion of the present property, cannot be regarded as a diversion or a breach of trust.

But, if words are found in the conveyance which forbid a change of site, the statute does not mean to violate that term of the contract, but lets the parties abide by the bargain they have made when the property was acquired. By the terms of this deed, the land is bought for the possessory use and benefit of the particular local church as a congregation, and is to be maintained and improved in perpetuity. The rents and profits, if any, are to be invested in the meeting-house and otherwise on the particular site; the congregation is tied down to that spot as their place of worship so long as the congregation exists. In brief, the trust inheres in the title, and so passes to the successive trustees indefinitely *in futuro*—not to be interrupted by a sale out and out. This is my reading of the statute and of this trust deed—but the result does not enure to the benefit of the plaintiffs.

Now the present trustees, the defendants, hold this land in trust for the particular church so long as it exists and can be traced and identified. The Stratford Evangelical Lutheran



Church of the deed had power to change the place at which its services should be conducted and also to change its name to that of the "Erie Street Church." These changes of local habitation and name are matters of ecclesiastical concern and cognizance, with which the Courts have nothing to do. The organisation of this particular church is based on the Independent or Congregational system, in which the voice of the majority of the members prevails. The minority, however small or large, is outvoted by the action of the majority, and the resolutions to vacate the old place, to sell or rent it, and to move into a new building on a new site, are all matters of congregational competence, and are conclusively settled as against the plaintiffs. The identity of the beneficiary church is established in favour of the body represented by the trustees, the defendants. The few who went out and banded themselves together with others in a new organisation, worshipping in the Downey street hall, are an offshoot from the old body, but thereby have ceased to be a part of it, and can have no right as once members of the original body to claim any part of the property vested in the trustees for that original body: see *per* Dickerson, J., in *Newburgh Associate Reformed Church Trustees v. Princeton Theological Seminary Trustees* (1837), 4 N.J. Eq. 77, and *Pine Hill Lutheran Congregation Trustees v. St. Michael's Evangelical Church of Pine Hill* (1864), 48 Pa. St. 20.

That appears to be the situation as regards the religious or ecclesiastical aspect of this controversy. None of the plaintiffs is a corporator or beneficiary because not a member of the old church. But that leaves untouched the consequences of this congregational act of removal in a legal point of view, as affected by the legal breaches of trust begun in part and in process of consummation by the sale of the land.

It may be well now to deal with the plaintiff Huegli, who is an outsider (so to speak) and stands alone in his claim. Assuming the non-existence of the church, the plaintiffs invoke that part of the deed which provides that, if the church loses its visibility, the land forthwith vests in the trustees of the nearest Evangelical Lutheran Church, which in this case happens to be the Erie Street Church, and the defendants the trustees. If

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so vested with the land in this character, the deed provides that the trustees shall be under obligation to open the church for regular or occasional services to any minister or missionary of the Evangelical Lutheran denomination holding the doctrinal views of the Augsburg Confession aforesaid. This requirement is fulfilled by Mr. Huegli, who is in good standing as a member of the Synod of Missouri, and is presented by the newly organised church on Downey street as a fit and proper person to be inducted for the time being in connection with the services to be resumed on the site owned by the defendants. The difference between this part of the trust and that which relates to the regular services held when the building is occupied by the original church is, that in the latter case the clergyman who has the right of entrée is one "duly authorised by the said Evangelical Lutheran Church to conduct the worship thereof." The context shews that the source of authority is to be sought, not in the denomination at large, extending over the continent, but in the particular body or church representing the original congregation. There being no lack of existence or of visibility of this latter body, the plaintiff Huegli is a clergyman not competent to officiate, whose claim to conduct the services in the old building may well be vetoed by the trustees. So that, to put it shortly, the plaintiffs, who complain of a breach of trust by the trustees, propose to enforce against them an occupancy of the site which would be a further breach of trust. Upon the ecclesiastical side, the old church body worshipping close by in Erie street regards this move as an attempt to establish a rival church in their proximity for no sufficient cause.

No amendment enabling the plaintiffs to sue on behalf of others who sympathise with them—and this is essential in order that no incongruity in the class represented may arise—no such amendment would better the cause of action. The legal title is in the defendants, and no breach of trust has arisen in regard to which the plaintiffs had a right or an interest to complain. The breaches of trust must be investigated by another method, probably by the intervention of the Attorney-General and a competent relator; but on that I do not decide. The only possible way of reparation to cure the breaches would be for the Zion

Church to retrace their steps, resume possession, and re-establish worship on the old site; but I suppose it is now too late for that remedy. It may be that the real solution of the difficulty is to resort to the Legislature and procure special legislation, which may quiet, if not satisfy, all concerned.

The action must be dismissed; but costs will not be given, considering that the question discussed is new and bare of precedent, and that the conduct of the defendants has not been according to law, however honestly undertaken.

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[TEETZEL, J.]

KENNEDY v. KENNEDY.

*Will—Construction—Gift for Maintenance of Residence—Perpetuity—Intestacy—Trust—Discretion of Trustees—Bona Fides—Power to Sell Lands—Conveyance Free from Charge of Annuity—Charge on Proceeds of Sale.*

Any gift, not being charitable, the object of which is to tie up property for an indefinite time, is void.

The testator devised his dwelling-house and lands and the chattels therein and thereon (except a number specifically bequeathed) to his son, the defendant J. H. K., but subject to certain provisions as to rights of occupation, etc., in favour of two granddaughters. He made other bequests; and then gave the residue of his estate to his executors and trustees "to be used and employed by them in their discretion or in the discretion of a majority of them in so far as it may go to the maintenance and keeping up my house and premises herein bequeathed to my son J. H. K. with full power and authority to them to make sales of any real estate upon such terms and conditions and otherwise as may be expedient and to execute all deeds documents and other papers necessary for the sale of same and to make title thereto to any purchaser thereof and the proceeds of such sales to devote as in their discretion or in the discretion of a majority of them may seem meet and necessary to keep up and maintain my said residence in the manner in which it has been heretofore kept and maintained and if for any reason it should be necessary that the said residence should be sold and disposed of I direct upon any such sale being completed that the residuary estate then remaining shall be divided in equal proportions among the several pecuniary legatees under this my will:"—

*Held*, that the gift of the residue was void as creating or tending to create a perpetuity; and that there was an intestacy as to the whole of the residue.

*Thomson v. Shakespear* (1860), 1 De G. F. & J. 399, *Carne v. Long* (1860), 2 De G. F. & J. 75, *Yeap Cheah Neo v. Ong Cheng Neo* (1875), L.R. 6 P.C. 381, and *Rickard v. Robson* (1862), 31 Beav. 244, applied and followed.

*Semble*, that, although the trust was in its nature imperative, and the amount to be expended was left in the discretion of the trustees, they could not at once appropriate the whole fund, regardless of the amount thereof and the amount necessary to be expended, for the benefit of the owner of the dwelling-house, the defendant J. H. K.; the trust must be executed in good faith.

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*Held*, also, that the wide power of sale vested in the trustees enabled them to make title to lands embraced in the gift of the residue free from a charge of an annuity thereon in favour of the plaintiff; but the proceeds of sale would be subject to the charge.

THE plaintiff, one of the next of kin of David Kennedy, deceased, brought this action to obtain a construction of the will of the deceased, and for a declaration that the gift therein to the trustees to keep up and maintain the residence of the testator was void as tending to create a perpetuity.

March 5. The action was tried before TEETZEL, J., without a jury, at Toronto.

*J. Bicknell*, K.C., and *W. A. Baird*, for the plaintiff and the defendants Robert Kennedy and Joseph H. Kennedy.

*E. D. Armour*, K.C., and *A. D. Armour*, for the defendant James H. Kennedy.

*W. M. Douglas*, K.C., for the defendants the Suydam Realty Company and Henry Suydam.

*T. P. Galt*, K.C., *A. J. Russell Snow*, K.C., and *W. A. Proudfoot*, for the other defendants.

March 28. TEETZEL, J.:—The principal question for determination is, whether or not a provision contained in the will of David Kennedy, deceased, is good, or void as creating or tending to create a perpetuity.

The clause containing the provision in question reads as follows:—

“The rest residue and remainder of my estate both real and personal I give devise and bequeath to my executor executrices and trustees aforesaid to be used and employed by them in their discretion or in the discretion of a majority of them in so far as it may go to the maintenance and keeping up my house and premises herein bequeathed to my son James Harold Kennedy with full power and authority to them to make sales of any real estate upon such terms and conditions and otherwise as may be expedient and to execute all deeds documents and other papers necessary for the sale of same and to make title thereto to any purchaser thereof and the proceeds of such sales to devote as in their discretion or in the discretion of a majority of them may seem meet and necessary to keep up and maintain my



said residence in the manner in which it has been heretofore kept and maintained and if for any reason it should be necessary that the said residence should be sold and disposed of I direct upon any such sale being completed that the residuary estate then remaining shall be divided in equal proportions among the several pecuniary legatees under this my will."

This clause and other parts of the will have been the subject of much judicial consideration during the last three years, beginning with *Kennedy v. Kennedy* (1909), 13 O.W.R. 984, and in *Kennedy v. Kennedy* (1911), 24 O.L.R. 183, and *Foxwell v. Kennedy* (1911), 24 O.L.R. 189; the last pronouncement being an unreported judgment of the Chief Justice of the Common Pleas, in January last, in *Foxwell v. Kennedy*, on the counter-claim of the defendants the Suydam Realty Company and Henry Suydam, decreeing in their favour specific performance of a contract for the sale of a portion of the residuary estate in consideration of \$97,000.\*

By the judgment in *Kennedy v. Kennedy*, reported in 24 O.L.R. 183, it was held by Mr. Justice Latchford that the provision in the above clause in favour of the pecuniary legatees was void, on the ground that it created a perpetuity. This judgment was affirmed by a Divisional Court (p. 189 of the same volume); and a judgment of mine in *Foxwell v. Kennedy*, formally adopting the judgment of my brother Latchford, was affirmed by a Divisional Court (p. 198 of the same volume).

The plaintiff is one of the next of kin of the testator, and in this action claims, not only that the gift of what may remain of the residuary estate, but also that the gift in its entirety to the trustees to keep up and maintain the residence of the testator, is void as tending to create a perpetuity.

The testator gives his dwelling-house and premises in the city of Toronto, together with the chattels therein or thereon at the time of his decease, except a number specifically bequeathed, to the defendant James Harold Kennedy, "but subject nevertheless to the provisions hereinafter made for Gertrude Maude Foxwell and Annie Maud Hamilton."

\*An appeal from this judgment was dismissed by a Divisional Court on the 6th May, 1912. See 3 O.W.N. 1225.

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The will contains provisions in favour of each of these ladies, to the effect that each is given a bed-room suite in a specified room in the house, together with the contents and furnishings thereof, with a right to live in said residence as a home as long as she remains unmarried, and to occupy said room with free and full ingress, egress, and regress thereto and therefrom, with all other privileges, rights, conditions, and conveniences necessary to the full enjoyment thereof, but on no condition is she to be looked upon to do or to be compelled to do any work or have any household duties or responsibilities except to look after her own apartment, and a right to remove the chattels when she leaves the premises; and his son James Harold Kennedy is to supply her with a key to the front door, with all necessary maintenance and board, all of which is expressly made a charge upon his residence and premises.

I think it is plain from all the provisions of the will with reference to his residence that the testator's scheme was to have the same maintained as a family residence for these two young ladies as long as they lived and for his son James Harold Kennedy and his family and descendants or whomsoever James Harold Kennedy might will or otherwise give the said residence to, and that as to such residence it should, until sold and disposed of, be kept up and maintained by the trustees and those succeeding them in the trust in the manner in which it had been kept up and maintained by him.

This being, as I think, the scheme which the testator had in his mind, the question for consideration is, whether, in making the provision for carrying out that scheme, he has not infringed the rule of law against perpetuities.

As the result of the best consideration I have been able to give to the numerous authorities cited in argument and others, I am of opinion that the gift in question is void as creating or tending to create a perpetuity. I am unable to distinguish this case in principle from such cases as *Thomson v. Shakespear* (1860), 1 DeG. F. & J. 399; *Carne v. Long* (1860), 2 DeG. F. & J. 75; *Yeap Cheah Neo v. Ong Cheng Neo* (1875), L.R. 6 P.C. 381; and *Rickard v. Robson* (1862), 31 Beav. 244.

In *Thomson v. Shakespear*, the provision of the will analogous to the provision in question was, that the testator gave his trustees £2,500 "to be laid out by them as they shall think fit, with the concurrence of the trustees of Shakspeare's house, already sanctioned by me, in forming a museum at Shakspeare's house, in Stratford, and for such other purposes as my said trustees in their discretion shall think fit and desirable for the purpose of giving effect to my wishes." In that case, as in this, the money was taken out of the estate, and was directed to be spent for the maintenance of the premises, and the period over which the expenditure should extend was likewise indefinite, and, not being for a charity, was held to be void as in violation of the rule against perpetuities.

In *Carne v. Long*, the testator gave his mansion house and premises, with the appurtenances thereunto belonging, unto the trustees for the time being of the Penzance Public Library, to hold to them and to their successors forever for the use, benefit, maintenance and support of the said library. The Lord Chancellor in giving judgment in that case said (p. 79): "My objection to it is, that it tends to a perpetuity. . . The clear intention of the testator, as expressed by the will, is, that this should be a gift in perpetuity to this institution at Penzance. The gift is to the trustees for the time being of the society and their successors, to be held by them and their successors for ever, they holding it for the use, benefit, maintenance and support of the library. If the devise had been in favour of the existing members of the society, and they had been at liberty to dispose of the property as they might think fit, then it might, I think, have been a lawful disposition and not tending to a perpetuity. But looking to the language of the rules of this society, it is clear that the library was intended to be a perpetual institution, and the testator must be presumed to have known what the regulations were. By one of these it is provided, that the society is not to be broken up so long as ten members remain. The devise, therefore, is for the benefit of a subsisting society, and one which is intended to subsist so long as ten members remain, and the property comprised in the devise is therefore to be taken out of commerce and to become inalienable, not for a life or lives in being and twenty-one years afterwards, but

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for so long as ten members of the society shall remain. This seems to me a purpose which the law will not sanction as tending to a perpetuity."

Now, in this case, the testator in effect says that his trustees shall spend such sums out of his residuary estate as they may deem necessary to keep up and maintain his residence until it is sold and disposed of; and, while such keeping up and maintenance is for the benefit of James Harold Kennedy and those who may succeed him as devisees and donees, they have no control over or power of disposition of the residue not appropriated by the trustees to keeping up and maintaining the residence. Nor have they the power, upon selling the residence, to dispose of any part of the fund set aside for its maintenance.

In the case reported in L.R. 6 P.C. 381, a gift "of the upper storey of four specific houses or shops, to be occupied by the several members and descendants of K.S.C. and L.K.W. as already proposed," that is, as the context shewed, as a family house for the use of two separate families, was held to be void for uncertainty, and as denoting an intention to create a perpetuity.

The analogy in this case is not, of course, the giving of this residence for the occupation of the son James Harold and the two ladies, but for its perpetual maintenance or until "it should be necessary that the said residence should be sold and disposed of."

In *Rickard v. Robson*, it was held that a bequest of money, the interest of which was to be applied in keeping up the tombs of the testator and of his family, is void as a perpetuity. It is difficult to draw a distinction between a provision for keeping up a tomb as a resting place of the deceased members of the family and a provision for the indefinite keeping up of a residence as a habitation for the living members of the family. See also *Hoare v. Osborne* (1866), L.R. 1 Eq. 585; *Fowler v. Fowler* (1864), 33 Beav. 616.

In *In re Gassiot* (1901), 70 L.J.N.S. Ch. 242, a bequest of £4,000 to the Vintners Company on condition that they accept a bequest of a portrait with certain obligations, and enjoining the company out of the income of the £4,000 to keep in due and proper repair the portrait, cleaning and regilding its frame not



less than once in every four years, the surplus income to be applied for the benefit of individuals answering a particular description, etc., was held to be void as infringing the rule against perpetuities.

See also *In re Dutton* (1878), 4 Ex. D. 54.

I think the general proposition of law to be drawn from the above cases is, that any gift, not being charitable, the object of which is to tie up property for an indefinite time, is void.

It seems to me that there can be no question in this case as to the indefiniteness of the time during which the residuary estate was to be tied up, inasmuch as many generations of owners may continue to occupy the residence before the happening of the event upon which further expenditures are to cease, *i.e.*, when it shall "be necessary that the said residence should be sold and disposed of."

Nor do I think that, upon a fair interpretation of the testator's language, it can be held that the residue, except such as, in the honest discretion of the trustees, it is necessary to expend for up-keep and maintenance of the residence according to the standard fixed by the testator, is not tied up and taken from commerce, within the meaning of the authorities. Neither the owners of the residence nor the trustees have any right to dispose of the fund for any other purpose. The trustees are bound to hold the whole fund for the purpose of the up-keep and maintenance until the happening of the event when, according to the testator's wish, the residue was to be distributed among his pecuniary legatees; and I cannot conceive how the fact that, because it has been held that the testator's wish in that regard has been defeated by reason of his language contravening the law, any advantage therefrom is to accrue to the owner of the residence.

I am unable to yield to the argument by Mr. Armour, that, because the trust is in its nature imperative, and the amount to be expended is left to the discretion of the trustees, they can at once appropriate the whole fund, regardless of the amount thereof or of the necessities for expenditures, for the benefit of the present owner, as, by his deed poll (exhibit 4), the defendant James H. Kennedy, the owner and sole trustee, has attempted to do. Like any other trust, it must be executed in good faith;

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and the Court will exercise its control to prevent a dishonest exercise of discretion. Whether or not the defendant James H. Kennedy, in the exercise of his discretion as evidenced by the deed poll, has acted honestly, I am unable, upon the evidence, to say; because the actual amount of the fund in his hands or the necessities for up-keep and maintenance were not disclosed in evidence before me; so that, if my judgment as to the total invalidity of the gift is not maintained, the plaintiff and other next of kin should be at liberty, in another action, if so advised, to contest the good faith of James H. Kennedy in the exercise of the discretion as evidenced by the deed poll.

The whole estate was charged with the payment of an annuity of \$400 to the plaintiff, and he claims that the lands embraced in the residuary gift cannot be sold except subject to that charge. In view of the wide power of sale vested in the trustees, it is, I think, perfectly plain that they may make title to the purchaser free from the charge, but the proceeds will be charged with the annuity.

At the trial, I dismissed the action as against the defendants Suydam and the Suydam Realty Company, but reserved the question of costs. I now think that there is no good reason why the plaintiff should not pay them.

The judgment will therefore be:—

(1) Declaring that the gift of the residue is void as creating a perpetuity, and that the lands embraced therein may be sold free from the plaintiff's annuity; declaring that the proceeds of the sale are charged therewith; and that, as to the whole residuary gift, there is an intestacy; reserving to the plaintiff and other next of kin, in the event of it being held that my judgment is wrong, the right to impeach, in another action, the good faith of the defendant James H. Kennedy in the exercise of his discretion as evidenced by the deed poll.

(2) That the action be dismissed with costs as against the defendant Suydam and the Suydam Realty Company.

(3) Except as to those costs, the costs of all parties shall be paid out of the residuary estate.

[IN CHAMBERS.]

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*Infant—Custody—Habeas Corpus—Right of Father against Maternal Grandparents—Welfare of Child—Agreement under Seal—Adoption—*  
 1 Geo. V. ch. 35, sec. 3—*Application of sub-sec. (2) to Father of Child*  
*—Principles of Equity.* March 29.

Upon an application, on the return of a *habeas corpus*, by the father of a child under three years of age, for the delivery of the child to him by the maternal grandparents:—

*Held*, upon the evidence, that, apart from agreement, the interests of the child would be better served by leaving her with the grandparents; the father having all reasonable access to her.

*Held*, also, that an instrument signed and sealed by the father, in view of the mother's impending death, by which the possession, custody, control, and care of the child, was placed in the hands of the grandparents, was, while it stood, a bar to the father's application; and it was valid in law under R.S.O. 1897, ch. 340, sec. 2 (now 1 Geo. V. ch. 35, sec. 3).

*Re Davis* (1909), 18 O.L.R. 384, distinguished.

*Quære*, whether a father is included in the words used in sub-sec. (2).

*Semble*, that, apart from the statute, if the agreement were made by the father in pursuance of an understanding that the child was to inherit the property of the grandparents, and if she were brought up by them under that impression, and if that were supplemented by an actual deed or will, irrevocable, to such effect, the Court, acting on principles of equity, would not, at the father's instance, disturb that arrangement.

*Held*, therefore, in the peculiar circumstances of the case, that the custody should not be changed.

*Ex p. Templer* (1847), 2 Saund. & C. 169, followed.

MOTION by W. H. Hutchinson, the father of Adah May Hutchinson, a child of two years, upon the return of a writ of *habeas corpus*, for an order for the delivery of the child to him, by the maternal grandparents, the respondents.

March 26. The motion was heard by BOYD, C., in Chambers.

W. N. Ferguson, K.C., for the applicant.

V. A. Sinclair, for the respondents.

March 29. BOYD, C.:—It is always unsatisfactory to deal with disputed facts as set forth in conflicting affidavits. There is a mass of material before me, which I have carefully perused, and find that there is a cumulation of domestic details on which the various deponents contradict each other in an embarrassing manner. Disregarding the smaller discrepancies, I should judge, despite all the divergent opinions, that there is no danger likely to arise to the child, whether she stays with her grandparents or goes to her father, in regard to any tubercular infection. Nor do I think there is any lack of affection on the part of the father,

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though it may be he is not so attractive to the child as her grandparents. They have been to all intents *in loco parentis* to this young girl since her birth. The parents of the infant lived in the house and home of the maternal grandparents from the date of their marriage till the death of the wife on the 7th December, 1911, with a short interval from April to the middle of July, 1911, when the parents occupied another house. But during these few months the infant was left with the grandparents. The child was born in August, 1909, and is yet under three years of age—said to be an active, healthy child, yet easily excited and needing careful treatment.

I have no manner of doubt that the child cannot be better placed than to be left with the grandparents; they are well to do, living in a roomy house, with a large lot, in which the child can play. The character of the grandparents is beyond reproach, and they stand particularly well in the opinion of the neighbours and townsfolk of Tillsonburg. They are devotedly attached to the child, as is the child to them, and they have really had everything to do with and for the child in its sleeping, clothing, maintenance, and personal supervision. The opinion I have formed on this head was shared in by the father himself in his conversation with Ernest Tretheway, and by Dr. Reid. It is also the opinion (for what it is worth) of Mr. and Mrs. Honsberger, who, having made affidavits to sustain the father's claim on the 20th March, explain away their statements in later affidavits made on the 25th March.

To hand over the child to the father would be in the nature of an experiment; he is a working man, aged about twenty-six, with no home at present; he proposes to establish one with the assistance of an elder sister, who has been for the last six or seven years working in a cutlery company's works at Niagara Falls, New York, and has had experience in looking after children. Owing to the scarcity of suitable houses in Tillsonburg, it is not likely that the father can do more than get some rooms where the child will be in a sense cooped up and with the street for a playground. The contrast between these prospects, even if the household machinery works smoothly, and the advantages possessed and now enjoyed by the child, is obvious.

No question of religion enters in to embitter the situation of



the claimants; and I see no good reason why the father should not return to the household of the grandparents, as they offered to allow him to do after the death of the child's mother. He says that he would have done so had they destroyed an agreement which he signed on the 4th December, 1911. This is an instrument under seal, prepared in view of the mother's impending death, so as to place the possession, custody, control, and care of the child in the hands of the grandparents, and providing that the father shall have access to the child at all reasonable hours. This instrument is upheld by the grandparents, but is being attacked in an action by the father to set it aside, which is now pending. I must regard this at present as a valid agreement which is binding on the father. It is not for me, on such material as I have before me, to anticipate a decision of the Court on this dispute. I have no doubt that the wishes of the dying wife were that the child should be left to the care of the grandparents.

The signed and sealed agreement of the 4th December, while it stands, appears to be a bar to any such application as the present; and it is valid in law under the statutory provisions in 1 Geo. V. ch. 35, sec. 3 (O.),\* taken from the revised statute in force when the deed was executed. But, apart from this agreement, I think, upon the material placed before me, that the interests of the child will be better subserved by letting her custody remain *in statu quo*; the father having all reasonable access to the child when he so desires; this right of access to be settled by the Local Master, if the parties cannot agree.

In *Re Davis* (1909), 18 O.L.R. 384, the head-note reads that the law of this Province knows nothing of adoption; but the attention of the Court was not directed to the Act I have cited, and proceeded on the provisions of the Act relating to neglected

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\*3.—(1) The father of a child under the age of twenty-one years, whether born at the time of the decease of the father or at the time *en ventre sa mère*, by deed or by his last will and testament in such manner and from time to time as he shall think fit, may dispose of the custody and education of such child while he remains under the age of twenty-one years or for any lesser time to any person in possession or remainder.

(2) Such disposition shall be good and effectual against every person claiming the custody or education of such child as guardian in socage or otherwise.

(3) The person to whom the custody of such child is so committed may maintain an action against any person who wrongfully takes away or detains him for the recovery of such child and for damages for such taking away or detention for the use and benefit of the child, 12 Car. II. ch. 24, sec. 8; R.S.O. 1897, ch. 340, sec. 2.

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children, and in particular those that can be called deserted and abandoned—which does not apply to this child.

It may be that the proper reading of the statute is, that the declaration that such disposition shall be good and effectual against all and every person claiming the custody and tuition of the child, does not include a father, if living. But I do not see any decided case to that effect. But, apart from the statute, if the agreement has been made by the father in pursuance of an understanding that the child was to be the heir to or inheritor of the property of the grandparents, and has been brought up by them under that impression, and if that is supplemented by an actual deed or will, irrevocable, to such effect, the Court, acting on principles of equity, will not, at the father's instance, disturb that arrangement. I refer to the considerations influencing the Court in such cases as *Lyons v. Blenkin* (1821), Jac. 245; *Roberts v. Hall* (1882), 1 O.R. 388, approved of in *Chisholm v. Chisholm* (1908), 40 S.C.R. 115.

Therefore, in the peculiar circumstances of this case, following *Ex p. Templer* (1847), 2 Saund. & C. 169, I refuse to change the custody.

I do not award costs to either side.

I can only express the earnest desire that the parties may take thought and act reasonably and considerately on both sides, so as to preserve harmony in the family and avoid a devastating litigation in the Courts, which may go far to impoverish the moneyed litigant, and to embarrass the one who is poorer.

[An appeal from the above decision was heard by a Divisional Court on the 27th May, 1912. Judgment was reserved.]

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[FALCONBRIDGE, C.J.K.B.]

BETHUNE V. THE KING.

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March 30.

*Succession Duty—Bequest of Share of Income of Fund—“Legacy by Way of Annuity”—Succession Duty Act, 7 Edw. VII. ch. 10, sec. 11(1)—Voluntary Payment to Crown by Executors of Will—Death of Legatee—Right to Recover Part of Sum Paid—Mistake of Fact or Law—Improvidence.*

A bequest in a will of the interest or income of a fund is not a “legacy given by way of annuity,” within the meaning of sec. 11(1) of the Succession Duty Act, 7 Edw. VII. ch. 10, but simply a gift of interest or income.

Where the whole of the succession duty attributable to the share of the income from a residuary trust fund bequeathed to a daughter of the testator was paid by his executors to the Treasurer of Ontario, and the legatee died about a year and a half after the death of the testator, when only one of the four “equal consecutive annual instalments” mentioned in sec. 11(1) would have been paid if the method of payment by instalments had been adopted:—

*Held*, that the payment was a voluntary one, not made under a mistake of fact; and, if made under a mistake of law, no part of the money could be recovered by the executors from the Crown.

*Seemle*, that the payment was not improvident.

PETITION of right presented by the suppliants as executors and trustees of the will of John Sweetland, deceased.

January 27. The petition was tried before FALCONBRIDGE, C.J.K.B., without a jury, at Ottawa.

*F. H. Chrysler*, K.C., for the suppliants.

*H. D. Gamble*, K.C., for the Crown.

March 30. FALCONBRIDGE, C.J.:—The petition, after setting out the will and probate thereof, states that the Solicitor to the Treasury for Ontario furnished the suppliants a statement shewing that the total succession duty payable in respect of the legacies and bequests of the said will amounted to the sum of \$8,379.82; that of this amount the sum of \$2,139.80 was attributable to duty payable in respect of the annuity bequeathed by the will to Caro-

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line Florence Anderson;\* that, in and by sec. 11 of the Succession Duty Act then in force, the duty payable upon any legacy given by way of annuity was to be paid in four equal consecutive annual instalments; and that, in the event of the annuitant dying before the expiration of the first four years, payment only of the instalments which fell due before the death of the annuitant should be required.

The suppliants, deeming it advisable to discharge the whole of the succession duty at once, and obtain a release thereof, paid to the Treasurer for Ontario a sum of money which included the duty, amounting in the aggregate to \$2,139.80, attributable to the annuity bequeathed to the said Caroline Florence Anderson.

The said Caroline Florence Anderson departed this life on or about the 9th day of November, 1908; and, therefore, the suppliants claim that, at the time of her decease, the only amount which they were legally liable for was the instalment of \$534.95 which became payable on the 5th May, 1908. And the suppliants claim that they paid to the said Treasurer \$1,604.85 in excess of the legal and proper amount payable.

The Attorney-General for Ontario, on behalf of His Majesty, objecting that the petition of right discloses no facts giving any cause of action to the petitioners against the Crown, says that the legacy or bequest to the said Caroline Frances Anderson was not an annuity within the meaning of the Succession Duty Act then in force; and, therefore, is not affected by that provision of sec. 11, sub-sec. 1, of said Act, which requires payment only of the instalments falling due before the death of the annuitant; and he

\*The testator died on the 5th May, 1907. His will was dated the 10th March, 1906. After certain specific bequests, he created a residuary trust fund, and directed that his executors and trustees should stand possessed thereof upon trust during the respective lives of his daughters, Selina Florence Geddes, Elizabeth Jane Thompson, and Caroline Florence Anderson, "to pay the net income derivable from the investment of the said residuary trust fund . . . unto the said Selina Florence Geddes, Elizabeth Jane Thompson, and Caroline Florence Anderson," in certain proportions specified; "and, upon the death of any of my said daughters, in trust to pay the share of such deceased daughter in the said net-income unto the surviving daughters in equal shares, and, upon the death of any one of such two surviving daughters, in trust to pay the whole of the said income unto the sole surviving daughter during her lifetime, and, upon the death of such sole surviving daughter, in trust to divide the said residuary trust fund between my granddaughter Isabella Shaw, . . . the children of the said Caroline Florence Anderson, and the children of my stepson . . . share and share alike, so that each of such persons will receive an equal amount."



further pleads that, if the legacy in question does come within the provision of sec. 11, then the amount paid for succession duty was paid under a mutual mistake of law, and is not recoverable back.

He further pleads, in the alternative, that, if the petitioners are entitled to the repayment of the said succession duty as claimed in the petition, then a further succession took place on the death of the said Caroline Florence Anderson as to that portion of the estate from which her claim was derived; and the succession duty thereon should be ascertained and paid.

Further, in the alternative, he pleads that the commutation of the succession duty to be paid was compromised upon the consideration of the whole estate, and the different interests therein; and, if the petitioners are entitled to repayment as asked, then the whole matter should be re-opened, and a new computation made.

The case rests entirely on the correspondence and on the uncontradicted evidence of Mr. Bethune.

The money was voluntarily paid in supposed pursuance of secs. 11 (1) and 12 (5) of the Succession Duty Act then in force (7 Edw. VII. ch. 10).

Section 11 (1) is, in part, as follows: "Provided that the duty chargeable upon any legacy given by way of annuity whether for life or otherwise shall be paid in four equal consecutive annual instalments, the first of which shall be paid before the falling due of the first year's annuity and each of the three others within the same period in each of the next succeeding three years. In case the annuitant dies before the expiration of the said four years payment only of the instalments which fall due before his death shall be required."

Section 12 (5) is as follows: "Notwithstanding that the duty may not be payable under this section until the time when the right of possession or actual enjoyment accrues an executor or person who has the custody or control of the property, may, with the consent of the Treasurer, commute the duty which would or might, but for the commutation, become payable in respect of such interest in expectancy, for a certain sum to be presently payable, and for determining that sum the Treasurer shall cause a present value to be set upon such duty, regard being had to the contingencies affecting the liability to and the rate and amount

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of such duty and interest; and on the receipt of such sum the Treasurer shall give a certificate of discharge from such duty."

Both the Solicitor to the Treasury and the suppliants seem to have assumed that the benefit conferred by the will upon Mrs. Anderson was a legacy given by way of annuity, within the meaning of sec. 11 (1). The authorities are quite clear that it was not an annuity. They are set out in the extended notes of argument, and the effect both of English and American cases is, that the income or interest of a certain fund is not an annuity, but simply a gift of interest or income. Among the numerous authorities cited, I refer particularly to *Foley v. Fletcher* (1858), 3 H. & N. 769; *Winter v. Mouseley* (1819), 2 B. & Ald. 802, at p. 806, where Best, J., says: "I have . . . always understood the meaning of an annuity to be where the principal is gone forever, and it is satisfied by periodical payments."\* See, in the *United States*, *Booth v. Ammerman* (1856), 4 Bradford ((N.Y. Surr.) 129, at p. 133.

If the money, then, was paid under mistake of law, which Mr. Chrysler seems to disavow, it could not be recovered back. James, L.J., says, in *Rogers v. Ingham* (1876), 3 Ch.D. 351, at p. 355: "I have no doubt that there are some cases which have been relied on, in which this Court has not adhered strictly to the rule that a mistake in law is not always incapable of being remedied in this Court; but relief has never been given in the case of a simple money demand by one person against another, there being between those two persons no fiduciary relation whatever, and no equity to supervene by reason of the conduct of either of the parties . . ." That is not this case, and it is the Crown from whom repayment is sought; and the position of the Crown is, as one might expect, certainly not inferior to that of a subject. This is very clearly laid down in *William Whiteley Limited v. The King* (1909), 101 L.T.R. 741.

Then it was certainly not paid under a mistake of fact. The only mistake (if any) was something which related to a future

\*The following English cases were cited, in addition to those mentioned by the learned Chief Justice: *Gibson v. Bott* (1802), 7 Ves. 89, 96; *Pridie v. Field* (1854), 19 Beav. 497; *Hedges v. Harpur* (1858), 3 De G. & J. 129; *Baker v. Baker* (1858), 6 H.L.C. 616; *In re Crane*, [1908] 1 Ch. 379.

event, *viz.*, the absolutely unforeseen occurrence of this lady departing this life when she did.

I do not see, therefore, how the suppliants can recover. It is not a case of hardship; the estate as a whole does not suffer. If the money had not been paid in this way, there would have been some other succession; and, some of the reversionary legatees being strangers, it is probable that, in the result, a larger amount of duty would have to be paid.

In this view, and considering that it was done to facilitate a winding-up of the estate, I think that the payment by the executors was not improvident; and probably in the passing of their accounts this circumstance will be taken into consideration.

I am of the opinion, therefore, that no case has been proved giving rise to any cause of action against the Crown; and that the petition should be dismissed.

It is not a case for costs as between the parties. If I have the power so to order, I direct that the suppliants be paid their costs, as between solicitor and client, out of the estate.

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[IN THE COURT OF APPEAL.]

STONE V. CANADIAN PACIFIC R.W. CO.

*Railway—Injury to Brakesman—Foreign Box Freight Car—Appliances for Coupling—Dominion Railway Act, secs. 264, 317—Interchange of Traffic—Negligence—Evidence—Jury.*

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The plaintiff, who had had experience as a railway brakesman, was acting as brakesman on a freight train of the defendants, when it became his duty to effect a coupling between a freight box car, part of the train referred to, which car (called the Wabash car) did not belong to the defendants, but had been received by them from a foreign railway company in the ordinary course of interchange of traffic, pursuant to sec. 317 of the Railway Act, R.S.C. 1906, ch. 37, and another car. The Wabash car was provided with automatic couplers; but, while it had a ladder at the side, near the end, it had no ladder on the end, as required by sec. 264 (5) of the Act. When the engine was moving the Wabash car towards the other car, the plaintiff, observing that the knuckle and coupler were closed, went down the ladder on the side of the Wabash car, near the end which was approaching the other car, with the intention of getting hold of the coupler-rod to open the knuckle so as to receive the coupler of the other car. He went to the bottom step, and, with his left foot resting on it, and holding on to the lowest rung of the ladder with his left hand, endeavoured to reach round the end of the car to the coupler-rod. While he was in this position, the moving car passed over a crossing, and the jar caused his foot to slip from the bottom step, and he fell with his arm under the wheels. In an action for damages for his injuries:—

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*Held*, that what befell the plaintiff was not due to the absence of a ladder at the end of the car, nor to the insufficient length of the coupler-rod; but to the plaintiff not having taken the proper course, viz., to signal the engine-driver to stop, and then get down and make the coupling from the ground, which he could have done; that there was no negligence on the part of the defendants; and no evidence to sustain such of the findings of the jury as were in favour of the plaintiff.

*Per Moss, C.J.O.*:—The obligation of sub-sec. (5) of sec. 264 of the Railway Act is confined to cars "of the company;" and the absence of end ladders on the Wabash car was not a contravention of the obligation.

THE following statement of the facts is taken from the judgment of Moss, C.J.O.:—

This is an appeal by the defendants from a judgment entered by the Chancellor of Ontario, upon the answers of the jury at the trial, awarding the plaintiff \$6,000 damages for injuries received while in the defendants' employment as a brakesman. The plaintiff was endeavouring to effect a coupling between two box freight cars, at or near Bolton Junction, a station on one of the defendants' lines of railway, and, while doing so, was either shaken off or fell from a ladder affixed to the side and close to the end of the car upon which he was riding, and one of the wheels passed over his right arm, necessitating amputation. The box freight car in question was not the property of the defendants, but had been received and was being hauled over their lines under the interchange of traffic provisions of the Railway Act. It had been received by the defendants at Detroit from the Wabash Railroad Company on the 14th March, 1911, loaded with merchandise for various points on the defendants' lines of railway, and on the 18th March it was in course of return to Detroit, *via* Toronto Junction, as part of one of the defendants' regular way-freight trains, when the accident happened.

The plaintiff attributes the accident to three causes: (a) the ladder being defective because the lowest step, or the step which was placed below the bottom of the car, was not joined to the rest of the ladder, but was separate and attached to the bottom timbers of the car, and was loose and insecure; (b) there was no ladder on the end of the car close to where the side ladder was; and (c) the coupling-rod used for controlling the action of automatic couplers, when about to effect a coupling of cars, did not extend outward from the couplers to the side of the car, or within a short distance from it, but was so short as to necessitate the going in between the cars, or at all events to render it necessary to reach very far beyond the side of the car in order to get hold of it.



The defendants denied all liability, and witnesses were examined on both sides. At the conclusion of the plaintiff's case, counsel for the defendants moved for judgment on the ground that no case of negligence had been shewn, but the learned Chancellor declined to withdraw the case from the jury. The motion was renewed at the conclusion of the whole case and again denied.

The learned Chancellor submitted to the jury a number of questions which with the answers returned are subjoined, *viz.*:—

1. Was the car in question owned by the C.P.R. or by another company? A. Owned by another company.

2. Was the car and its fittings reasonably safe for the employees of the C.P.R., in the usual operations of the road? A. We think not.

3. Was the plaintiff, having regard to all the circumstances, in his method of arranging the gear for coupling the cars, acting according to good and proper practice? A. Not having received circular No. 4, we think he acted to the best of his knowledge.

4. If not, wherein did he err?

5. Was the plaintiff injured in consequence of any defect in the make-up of the car? A. Yes, in our opinion we think he was.

6. If he was so injured, state everything which you find to be wrong. A. The car in question lacked the ladder on end of car and long lever equipment used by C.P.R., in which company he was employed.

7. Could the plaintiff, by the exercise of reasonable care, have provided for the coupling of the cars with safety to himself? A. In our opinion, not under the circumstances.

8. Do you find negligence as to the matters in dispute?

(a) In the C.P.R.?

(b) In the plaintiff?

(c) Or, in both of them?

9. If so, state briefly what was the negligence in each case.

10. If the plaintiff is entitled to damages, state how much. The jury have agreed on \$6,000 for damages for plaintiff.

Upon the answers judgment was entered for the plaintiff for \$6,000.

The defendants now appeal, contending that the plaintiff is not entitled to recover damages against the defendants; that, if entitled to any judgment, the damages should be limited to the

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amount recoverable under the Workmen's Compensation for Injuries Act; and that, in any event, the damages awarded are excessive.

January 18 and 19. The appeal was heard by Moss, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, J.J.A.

*I. F. Hellmuth*, K.C., and *Angus MacMurchy*, K.C., for the defendants. The learned trial Judge should have given effect to the motion for nonsuit at the close of the plaintiff's case, or at least upon the whole case he should have told the jury that no liability had been made out. There was no breach of any statute by the defendants. Unless the provisions of sec. 264 of the Railway Act, R.S.C. 1906, ch. 37, apply, there appears to be no rule against the transport of foreign box freight cars. The car in question was not in contravention of that section. It was received in the ordinary course of the obligation to interchange traffic, imposed by sec. 317 of the Railway Act, and was properly inspected. The evidence shewed that the accident was caused, not by the negligence of the defendants, but by that of the plaintiff, and that he was the author of his own injury. His position on the ladder was not a proper one, and was an unauthorised and a dangerous one. He should have signalled the engine-driver to stop, and then got down and made the coupling from the ground. At any rate, the jury by their answers have not directly found the defendants guilty of negligence, though they have found that the Wabash car was defective. There was no evidence on which a jury could reasonably find that the alleged defects pointed to in the answers to questions 5 and 6 were the proximate cause of the accident. There was no evidence to justify the answer to question 7. There was neither statutory nor common law liability. In any event the damages are excessive.

*A. E. H. Creswicke*, K.C., and *Christopher C. Robinson*, for the plaintiff. The judgment below should be affirmed. The findings of the jury which bear upon the questions of negligence and contributory negligence are amply supported by the evidence, and should not be disturbed. The evidence and findings of the jury shew clearly that the defendants were guilty of a breach of their statutory duty under the Railway Act, and that such breach was the cause of the accident. See sec. 264 (c), and sub-sec. 5; *Durant v. Canadian Pacific R.W. Co.* (1909), 13 O.W.R. 316; *Scott v.*

*Canadian Pacific R.W. Co.* (1909), 19 Man. L.R. 165. In everything but the ladders, the Act deals with the train, the ladders being dealt with in reference to "cars." Therefore, the statute applies to the coupler, whether the cars are foreign or not. In reference to sec. 256 of the Railway Act, see *Atcheson v. Grand Trunk R. W. Co.* (1901), 1 O.L.R. 168, and MacMurchy and Denison's Railway Law of Canada, 2nd ed., p. 410. As to secs. 284 and 317, no company is bound to accept cars unless properly equipped: *Richardson v. Great Eastern R.W. Co.* (1876), 1 C.P.D. 342. On the question of contributory negligence, we submit that on a plea of "not guilty by statute" that question is not open. *Doan v. Michigan Central R.W. Co.* (1890), 17 A.R. 481, is not conclusive. The jury have found against contributory negligence: *Canadian Northern R.W. Co. v. Anderson* (1911), 45 S.C.R. 355.

*Hellmuth*, in reply. We are not obliged to plead contributory negligence.

April 4. Moss, C.J.O. (after setting out the facts as above):— Upon all the facts disclosed in evidence, and having regard to the circumstances under which the plaintiff met with the injury, I think that, if I had tried the case without a jury, I should have had no hesitation in holding that the plaintiff had not succeeded in fastening liability upon the defendants. But, the case having been submitted to the jury, and their answers to the questions being now before us, there arise for consideration the questions: (a) whether there was evidence proper to submit to the jury upon the questions of negligence on the part of the defendants; and, if so, (b) whether, upon the answers, judgment should not have been entered for the defendants.

The plaintiff, a young man twenty-two or twenty-three years of age, who had been for over five years in the employment of the Canadian Express Company, but in what capacity does not appear, though it may be inferred that it was work in connection with railways, and was subsequently employed by the Grand Trunk Railway Company as a brakesman for six months, entered the defendants' employment as a spare brakesman on the 20th August, 1910, and continued in that capacity, though not engaged all the time in actual work, until the date of the accident, on the 18th

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March, 1911. On that day he was engaged as brakesman on a freight train with the box freight car in question as one of the cars. At Bolton Junction it was necessary to detach a car which was to be left there, and it was cut out by means of a running shunt. After performing that and some other operations, the next step was to unite the remainder of the cars, which were to go on to Toronto Junction. The car in question—called the Wabash car—was to couple with a car some distance from it on the line. The plaintiff, as his duty required, went upon the roof to signal the engineer to back down to the other car. When the engine was moving the Wabash car down towards the other car, the plaintiff, according to his testimony, observed that the coupler on it was closed—that is, that the knuckle was not in a position to effect a coupling with the Wabash car unless the knuckle or its coupler, which was also closed, was opened.

In order to open this knuckle, the plaintiff went down the ladder on the side of the Wabash car, near the end which was approaching the other car, with the intention of getting hold of the lever or coupler-rod by which the knuckle was opened or closed, and by lifting it thereby open the knuckle so as to receive the coupler of the other car. He went to the bottom step, and, with his left foot resting on it, and holding on to the lowest rung of the ladder with his left hand, and with his right foot hanging down and swinging in the air, he endeavoured to reach around the end of the car to the lever or coupler-rod. This lever was connected with the top of the coupler, with the rod projecting towards the side of the car on which the plaintiff was. While he was in this position, the car, moving at the rate of about seven miles an hour, passed over a crossing of two tracks, and the jar caused his foot to slip from the bottom step, and he fell with his arm under the wheels. In his evidence he said that the lever-rod projected only some fifteen or sixteen inches from the coupler, which was about four feet from the side of the car, so that the end was about thirty-two or thirty-three inches from the side of the car where he was. He further said that the bottom step was about eleven inches in width, and was loosely and insecurely fastened to the bottom timber of the car, besides not being under the ladder but to one side of it, and that the side which was the furthest from the end of the car. In all these respects the testimony adduced by the defendants amply



and satisfactorily displaced the plaintiff's contentions. But, as the case stood at the end of the plaintiff's case, the learned Chancellor could not have withdrawn it from the jury if the defendants' negligence rested upon proof of these facts. It was admitted that the Wabash car had not ladders on the ends, as required by sec. 264 (5) of the Railway Act. The plaintiff, in examination in chief, stated that, had there been a ladder at the end of the car, he would have gone down it, and endeavoured to make the coupling. But on cross-examination he admitted that it was not good railway practice to go down between the ends of two cars to make a coupling when the car was in motion—but, he said, "you see it done every day." It is manifest that such a practice is not only dangerous but is directly opposed to the policy of the law as declared by sec. 264 (c) of the Act. He also suggested that, if the ladder had been at the end, he might have saved himself from falling, by catching it; but it is difficult to suppose that he could have seriously believed that that was one of the purposes for which a ladder is required on each end of a car. It was not, however, proved or admitted during the plaintiff's case that the car was not the property of the defendants. And, assuming it to have been the defendants' property, there were the questions whether it was fitted with couplers and ladders as required by sec. 264, and whether the failure to provide them was the cause of the accident, or whether it was due to the plaintiff's own want of care or failure to observe the usual and proper modes of making the coupling. The plaintiff admitted that the proper course would have been to signal the engine-driver to stop, and then get down and make the coupling from the ground, which he could have done. He excused himself by saying that he was on the fireman's side of the car, and that the engine-driver was not looking, and so he (the plaintiff) could not give any signal.

Upon the whole, although scanty, there was enough at the close of the plaintiff's case to justify the refusal to enter judgment for the defendants. But at the close of the whole case, when it had been proved, and indeed admitted, that the car was not the defendants' property, but was owned by the Wabash or some other company, other questions arose as to the liability of the defendants for the failure of this car to comply with all the requirements of sec. 264, applicable to couplers and ladders on box freight-cars.

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The car had been received in the ordinary course of the obligation to interchange traffic, imposed by sec. 317 of the Railway Act. It had been inspected in due course and passed in accordance with the ordinary practice, by inspectors whose competency was not questioned. Many hundreds of box freight cars without ladders on each end are received and passed daily, entering Canada from the United States. It is shewn that there is no rule, statutory or otherwise, requiring that there shall be ladders on the ends as well as on the sides of box freight cars used on railways operated in the United States. The car was provided with automatic couplers, but the complaint is as to the length of the lever, or coupling-rod. There is no express provision in the Railway Act prescribing the length of the lever, but the testimony for the defendants shewed that the end of the lever on the car extended to within fifteen or sixteen inches of the side, instead of thirty-two of thirty-three inches, as the plaintiff stated. The modern Canadian lever is made to extend out to the side, or to within at least eight inches; but cars from the United States, with the end of the lever fifteen or sixteen inches from the side, are admitted and passed in the usual and ordinary course of inspection. Unless the provisions of sec. 264 apply, there appears to be no statutory or other rule against the transport of foreign box freight cars, although they do not comply in every respect with the Railway Act.

Section 264 (1) enacts that "every company shall provide and cause to be used on all trains modern efficient apparatus, appliances and means, . . . (c) to securely couple and connect the cars composing the train, and to attach the engine to such train, with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars." Assuming the expression "and cause to be used" to comprehend foreign cars in transport over the defendants' lines, the car in question was not open to objection for any defect in the above-mentioned respects.

Sub-section (5) enacts that "all box freight cars of the company shall, for the security of railway employees, be equipped with,—(a) outside ladders, on two of the diagonally opposite ends and sides of each car, projecting below the frame of the car, with one step or rung of each ladder below the frame, the ladders being

placed close to the ends and sides to which they are attached." The car in question had not ladders on the ends, but it was not a car "of the company." There is a distinction drawn between the couplers to be used on all trains, and the equipment of box freight cars with ladders. The obligation with regard to the latter is confined to cars of the company. The car was, therefore, not in contravention of the sub-section. Even if the contrary were the case, it is clear that their absence in no way contributed to the accident which befell the plaintiff. I think that, upon the whole case, the jury should have been told that no case appeared upon which they could reasonably find that the defendants were negligent, and that no case of liability had been made out; and that the action should have been dismissed.

Assuming, however, that it was proper to submit the case to the jury, is the plaintiff entitled to judgment upon the answers returned to the questions? It is to be observed, in the first place, that the jury failed to return answers to the very pointed and material question on the head of negligence contained in No. 8. But they answer the very general question No. 2, "Was the car and its fittings reasonably safe for the employees of the C.P.R. in the usual operations of the road?" which is not directly pointed at the alleged defects leading to the injury, and a negative answer to which is not a finding of negligence on the part of the defendants.

The answers to questions 4 and 5 bear more directly on the question. They attribute the plaintiff's injury to the fact that the car in question lacked the ladder on the end of the car and the long lever attachment used by the defendants in their cars. But there is no evidence upon which a jury could reasonably find that these alleged defects were the proximate cause of the accident. The plaintiff was endeavouring by using the side ladder not as a means of descending the ladder to the ground and there effecting the coupling, as he admits was the proper course, but for the purpose of enabling him, by using the lowest step as a foothold and crouching with his body in a strained and awkward position, to effect the coupling, without stopping the car or getting down to the ground. The position was admittedly an improper, and certainly a very dangerous, one, not authorised to be taken. The method adopted by the plaintiff to endeavour to effect the coupling

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was the very one most calculated to expose him to danger and risk of injury. And there is no evidence to justify the answer of the jury to the 7th question, an answer which, in its terms, is inconclusive and unsatisfactory. There were no "circumstances" to prevent the plaintiff from adopting the perfectly safe course which he admits he might have done.

Having regard to the evidence in the case, I do not think the answers sufficient to support the judgment entered for the plaintiff; and I think that, notwithstanding them, judgment should have been entered dismissing the action.

The appeal should be allowed, and the action dismissed, with costs if exacted.

GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A.:—A good deal that has been said and done in this case seems to me to have quite missed the mark which should have been arrived at; for instance, all of that branch of it which deals with the requirements of the statute-law regarding ladders at the ends of "box freight cars." It can make no difference whether there was any such requirement in respect of the "Wabash" car, from which the plaintiff fell, or, if so, whether that obligation was imposed upon the company that owned the car, or upon the company who were using it in the carriage of their freight, or upon the defendant company, who had received and were forwarding it as interchanged freight only, if, as I think, it is incontrovertible that the ladder was not required to be provided for the work in which the plaintiff was engaged when he fell and was hurt; but, on the contrary, that, if he had made use of any such ladder for such a purpose, he would have misused it, contrary to the provisions of the enactment in question, against the wishes and interests of his masters, against his own interests, and against the first instincts of all animals—self-preservation. If he had fallen from such a ladder as he did from the one in question, his life, not only one hand, would have paid the penalty.

It is quite obvious to any one who has not had, as the plaintiff had, six years' experience in railway matters as a brakesman and otherwise, that it is dangerous to go between cars of any train, and extremely so if they are in motion; and it is equally obvious



that that risk should not be taken in any case in which it can reasonably be avoided; quite obvious that it is against the interests of him who does it, of his relatives and friends, and of his employers, as well as against the public interests, that risk of life or limb should be undertaken when there is no occasion for it.

As to his experience, he tells of it in these words:—

“Q. You have had no experience in railway matters before you went into the employ of the C.P.R.? A. Yes, sir.

“Q. To what extent? What was your experience? A. I had been with the Canadian Express Company for about five or six years, and I was with the Grand Trunk as brakesman.

“Q. Passenger brakesman or freight? A. Passenger and freight both.

“Q. Then your experience up to the time you quit their employ would be about five or six years, would it? A. Yes, about six years.”

In the same section of the Railway Act in which the requirement as to the ladders is contained, it is expressly and plainly required, in the interests and for the safety of just such men as the plaintiff, that automatic couplers, “which can be uncoupled without the necessity of men going in between the ends of the cars,” shall be provided, and used, upon cars such as that in question. So that, if such couplers are provided, what possible excuse can there be for going between the cars to uncouple them, not to speak of going between them and doing the work on a perpendicular box car ladder, without any sort of reason for not doing that work from without the cars?

It seems to have been thought necessary, by a learned Judge, to say that you cannot have damages for injury to a finger in the closing of a passenger carriage door, merely because the headlight of the engine, which was drawing the train, was not burning when it should have been; and so it seems to me to be necessary to repeat somewhat frequently the observation that one cannot have damages for any negligence which is not the proximate cause of the injury.

So that really this case depends entirely upon the two questions: (1) whether the defendants were guilty of any negligence in respect of the kind of brake which the plaintiff was attempting to uncouple only; and, if so, (2) whether that negligence was, or

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whether the plaintiff's want of care in whole or in part was, the cause of his injury.

The jury have not found any negligence in the defendants; it would be very hard to see how they could. The question was pointedly put to them. The substance of their findings, in so far as they affect this case, is, that the "Wabash" car was "defective" in not having "the ladder on the end of the car and long lever equipment," such as the defendants have upon their own cars; and that, in consequence of such defects, the plaintiff was injured.

The findings are not very consistent, for, if the ladder which was not provided had been provided, and if the plaintiff had used it, he would have had no need of a long lever uncoupling rod. His testimony is, that, if there had been a ladder at the end of the car, he would have used it in uncoupling. A longer rod might have made the task of uncoupling from the side ladder somewhat easier; but possibly less so from an end ladder; the lengthened rod is to enable doing the work without going between the cars.

But there is no evidence that the uncoupling rod did not fully comply with the requirements of the statute, and no finding that it did not; how then can the judgment be sustained? And, as I have before mentioned, there is no finding of negligence on the part of the defendants; and, if there had been, there is no evidence whatever to support such a finding; the plaintiff's case seems to me to be hopeless in this respect; indeed, it may be that the requirements of the enactment, in this respect, are all that the law can require from any company subject to its provisions, whichever company may be the one to which it applies, if it does not apply to more than one of the companies concerned in the making and the movement of the car in question.

In addition to all this, it seems to me to be impossible for any reasonable man to say, conscientiously, that the plaintiff's injury was not caused altogether by his own negligence; and considerably less than that would deprive him of any right to recover.

The statute-law, passed for the especial benefit of persons engaged in car coupling and uncoupling, as a brakesman especially is, shews the impropriety of uncoupling in any manner making it necessary to go between the cars for that purpose. If the plaintiff were a novice complaining of being put at dangerous work without proper instructions, the case might be different; but he was a

man of six years' experience "in railway matters;" and is without any sort of excuse for adopting the extraordinary method which he was employing when injured. I cannot but think it likely to bring legal methods into conflict with the commonest of common sense if it can be lawfully determined that the plaintiff was acting properly in endeavouring to uncouple cars in motion, from a ladder on the side of the car, too far, according to his testimony, from the end of it, and, according to the same testimony, with a foot-hold too shallow and not wide enough to get both his feet into, and shaky at that, with a coupler rod too short to be operated without danger; and while supported by one foot only upon the loose step, and one hand only upon the rung of the ladder next above that in which his foot was, and only about twenty inches apart, and then making an unduly long reach around the end of the car with his right hand to uncouple; when there was absolutely no need of attempting it, and when so doing was in the teeth of the interest of every one, as before-mentioned, as well as of the enactment already referred to.

It was suggested that the plaintiff should have our sympathy, however unwisely he may have acted, because, it was said, he was taking the risk in his masters' interests and for their benefit; the first part of the proposition I assent to, provided however that such sympathy does not warp the judgment; the latter part is obviously erroneous; there is no kind of evidence of over-zeal on the plaintiff's part in his masters' service; as I have intimated, he did that which was, and he must have known was, against the interests of every one because of the danger of it; he knew that every one's interest required that the uncoupling should be done from the ground without going between the cars and when they were not in motion, and that there was no sort of reason why that course should not be taken; but familiarity with danger breeds contempt of it, and he is not the only man who would not hesitate to take the risk rather than take the additional trouble to stop the train and get down and uncouple and get up again; for, after all, the risk might be undertaken a good many times without a fall, and a good many falls might happen without getting any part of one's body under the wheels; and he is not the only man who is willing to make the trip's work as short as possible and to be home again as soon as possible.

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The jury have hedged themselves in, with a shifty answer, from the untrue finding that the plaintiff could not, by the exercise of reasonable care, have uncoupled the cars in safety: "In our opinion, not under the circumstances;" and they quite dodged the question whether that which the plaintiff was trying to do when he fell was "according to good and proper practice," meaning, I suppose, was it a proper method of uncoupling the cars? The jury should have been asked what they meant by "under the circumstances;" if under the circumstances of standing on the ladder as he was and attempting to do the work in that way—if they assume that that was proper—there might be some justification for the answer; but that would be entirely begging the question.

I would allow the appeal and dismiss the action.

MAGEE, J.A.:—The plaintiff was brakeman on top of a freight car, at the rear of a train which was being pushed back to be coupled to another car which was stationary. Both cars had automatic couplers—but in order to couple it is necessary that the knuckle of one or other shall be open. He noticed that both were closed. The knuckle, according to the defendants' witness Hawkes, can be opened by the operating lever of a moving car. To reach the operating lever the plaintiff descended the only ladder at that portion of the car. That was a ladder on the side of the car, which appears from the evidence to have been reasonably close to the corner or end.

It is, I think, clear from the evidence that it was customary for brakemen to operate the levers from the ladders while the cars were moving. It had been done only a few moments before by the other brakeman opening the coupler of the adjoining car to make a flying shunt. The conductor says it was quite customary, and he would not think of reporting a brakeman for doing it, and had never told any one not to do it. The general yard-master, called for the defendants, states that the lever can be operated from the side-ladder.

It is sought to draw a distinction between operating the lever on a moving car in order to uncouple, and doing so in order to couple. But the plaintiff states, and he is not contradicted but indeed borne out by other evidence, that he had plenty of time



to do what he was going to do and get around to the side out of the way before the cars would couple. Really all he proposed doing was operating the lever on a moving car. Nowhere do I find that to be forbidden. It was argued that this was contrary to the defendants' circular No. 4 of the 15th February, 1911, which, however, the jury find the plaintiff not to have had notice of. That circular forbids "all acts familiarly known as taking chances," and it calls attention to accidents which had occurred "solely by carelessness on the part of some employee, such as," *inter alia*, "adjusting coupler . . . when cars are in motion." But Mr. Hawkes, the defendants' yard-master, expressly states, as one might expect, that opening the knuckle by the operating lever is not "adjusting the coupler." That circular naturally enough puts "adjusting coupler" in the same category with "turning angle-cock or uncoupling hosebags"—all which would have to be done by going between the cars on the ground. But the circular is luminous in respect of several operations. Thus it refers to "accidents from holding on side of car," but only "when passing platform, building, or other obstruction known to be close to track;" "kicking cars into sidings," but only where other cars are standing; and "detaching moving cars" without first seeing to the brakes being in order. This last instance impliedly recognises the practice of detaching moving cars if only the brakes are in order. The plaintiff was injured in an operation not a whit more dangerous than those which are here impliedly recognised, and not at all one which involved the danger of going between cars.

But it seems to me that the plaintiff was not warranted in trying to work the lever from the position which he took, that is, holding with one hand the very lowest rung of the ladder only fourteen inches above the edge of the car, with one foot on the step, only six and a half inches below the edge. He does not shew that there would have been any difficulty in reaching the lever while grasping a rung higher up. Mr. Hawkes considers it quite feasible to have done so, even from the upper rung, which I would doubt, though it is not contradicted. The plaintiff would seem to have been in fact inviting disaster by attempting to reach the lever while in that attitude. There was no compulsion of any sort upon him to do so, either from fear of injury to his employers'

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property or otherwise. It is simply a case of unnecessary overbalancing, so far as appears—and, however much one may feel sorry for his injury, it cannot, I think, be said to be caused by the defendants' negligence or breach of statutory duty, if there was such duty as to this car of another company.

*Appeal allowed.*

[IN THE COURT OF APPEAL.]

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*Criminal Law—Exposing for Sale or Selling Obscene Books—Criminal Code, sec. 207—Conviction—Evidence—Knowledge of Sale and of Character of Books.*

To sustain a conviction under sec. 207 of the Criminal Code, R.S.C. 1906, ch. 146, as amended by 8 & 9 Edw. VII. ch. 9, for selling or exposing for sale obscene books, it must be shewn that the books were sold or exposed for sale with the knowledge of the defendant, and that he knew of their obscene character.

And *held*, upon a case stated by a Police Magistrate, that, having regard to the character and extent of the defendant's business and to his reputation as a book-seller, there was no reasonable evidence upon which he might be convicted of having knowingly sold or exposed for sale obscene books, within the meaning of sec. 207.

CASE stated by one of the Police Magistrates for the City of Toronto.

The defendant was convicted upon an information charging that, in the month of April, 1911, he, the defendant, contrary to law, exposed for sale and sold certain indecent and obscene books, tending to corrupt public morals, contrary to the form of the statute in such case made and provided.

Section 207 of the Criminal Code, R.S.C. 1906, ch. 146, as amended by 8 & 9 Edw. VII. ch. 9, provides: "Every one is guilty of an indictable offence and liable to two years' imprisonment who knowingly, without lawful justification or excuse,—(a) makes, manufactures, or sells, or exposes for sale or to public view, or distributes or circulates, or causes to be distributed or circulated, or has in his possession for sale, distribution or circulation, or assists in such making, manufacture, sale, exposure, having in possession, distribution or circulation, any obscene book or other printed, typewritten or otherwise written matter, or any picture, photograph, model or other object tending to

corrupt morals, or any plate for the reproduction of any such picture or photograph."

The stated case was as follows:—

"Pursuant to the order of the Court of Appeal dated the 15th May, 1911, I submit the following questions for the consideration of the Court:—

"1. Was there evidence upon which the defendant might be convicted of the offence of selling obscene books, within the intent and meaning of sec. 207 of the Criminal Code?

"2. Was there any evidence upon which the defendant might be convicted of having knowingly sold or exposed for sale obscene books, within sec. 207 of the Criminal Code?"

December 6, 1911. The case was heard by Moss, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*George Wilkie*, for the defendant, argued that it had not been proved that the books had been exposed for sale or that they were obscene, or that they were sold or exposed for sale with the defendant's knowledge, or that the defendant knew of their obscene character. These were essentials of the case for the prosecution: *Rex v. Beaver* (1905), 9 O.L.R. 418. On the question of obscenity, he referred to *Burbidge's Digest of the Criminal Law of Canada*, pp. 163 and 164, especially the note at the foot of the latter page.

*J. R. Cartwright*, K.C., and *E. Bayly*, K.C., for the Crown, contended that the defendant had been rightly convicted. There was sufficient evidence to establish that the defendant had knowledge that the books were on sale and were sold and that they were obscene. On the question of obscenity they referred to *The Queen v. Hicklin* (1868), L.R. 3 Q.B. 360; *People v. Doris* (1897), 14 App. Div. N.Y. 117; *People v. Muller* (1884), 96 N.Y. 408; *State v. McKee* (1900), 73 Conn. 18; *United States v. Bennett* (1879), 16 Blatchf. (Circuit Court) 338; *Rex v. Key* (1908), 1 Cr. App. R. 135.

*Wilkie*, in reply.

April 4, 1912. MEREDITH, J.A.:—The convicted man is a reputable book-seller, who carries on business, in an extensive way, in one of the business centres of Toronto. Although neither his reputation, nor the character and extent of his business, is

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a reason why he should not be convicted, and punished, if guilty, yet they are not things without weight, and very considerable weight, in considering the probabilities of the truth of the charge against him upon the question whether there was any reasonable evidence of guilt adduced against him at the trial, as well as upon the question of fact, with which the Court cannot deal, whether guilty or not guilty.

The charge against him seems to have been a double one in two senses, exposing for sale and selling two different obscene books; but no question is raised in that respect; the conviction seems to have been in accordance with the charge, as if of one offence only.

The offence is one against morality, and one of a despicable character; the maximum punishment of which is two years' imprisonment; and it must be "knowingly" committed, "without lawful justification or excuse."

Assuming the books to have been sold, or exposed for sale, and to have been obscene books, which is assuming a good deal in favour of the prosecution, two other essential things must have been proved against the accused before he rightly could have been convicted: (1) that the books were sold or exposed for sale with his knowledge; and (2) that he knew of their obscene character. This is but a reasonable provision of the law; if it were otherwise, the lot of a book-seller, however honest and anxious to avoid anything like offending morality, would be a hard one; and especially hard upon one who carries a stock of a quarter of a million volumes, as one of the witnesses thought the accused does.

Neither book was manifestly or notoriously obscene or immoral; and it may be that neither is in that respect better or worse than a great number of books which are freely sold and read everywhere; and there is, I should think, nothing in either of them to make them very attractive to any one; and the small profit to be derived from their sale is hardly such as would induce a large dealer to conceal them in his cellar, so that he might sell them with less chance of being found out, and to sell them with the possibility of two years' imprisonment in the penitentiary before his eyes.

There was no sort of evidence of any exposure of them for



sale; and there, manifestly, should have been a finding of "not guilty" to that extent; but there was not; on the contrary, there seems to have been a conviction in respect of which the penalty imposed was to some extent imposed.

Nor can I think that there was any reasonable evidence of a guilty knowledge on the part of the convicted man of the sale which was made, and which was of one of the books only, or of its obscene character, if it really has any.

It is quite plain that, in the extensive business of the convicted man, the books in question might have been bought and sold without his knowledge; he did not attend to the department in which such books, that is, "works of fiction," are sold. He testified that he did not know that there were any such books in his establishment; that he had a year or more before found invoices of them and returned them, because, from what he had heard, he thought their tendency was suggestive, and so did not want to sell them. There is not a word of testimony to the contrary of this; the most that can be said is, that, if dealing with a man who might be thought untruthful and tricky, there were some circumstances of suspicion, a book having been sold and other books having been found in the cellar; things which are not unsatisfactorily explained by the witnesses for the prosecution. But no one, much less a reputable man doing an extensive reputable business, is to be convicted on suspicion merely; when there is no more than that against him a verdict of "not guilty" should be entered. The statement that, from what he had heard, he thought their tendency suggestive, is a good way removed from an admission that he knew that they were obscene.

The cases which were referred to on the argument here were very different from this case; in them the obscene character of the writings was manifest, and in some of them it was the author who was prosecuted and who had sold them.

In a case of this character, where there may be different opinions as to the immorality of a book, which is being generally sold here and in other countries or another country, it would seem to me to be the better course for those who object to its sale on that ground, to give notice of such objection to such a book-seller as the convicted man is, and to prosecute only if the objection is not heeded. No such book-seller can have any

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reasonable desire to sell such books as those in question, if they be obscene, for all there is in it for him, at the risk of being branded as a criminal and sent to penitentiary for two years, after first perjuring himself in the hope of escaping conviction.

I would answer the second question in the negative and direct that the accused be discharged.

MAGEE, J.A.:—The two questions stated by the Police Magistrate under the order of the Court for its opinion refer only to sec. 207 of the Criminal Code, 1906, under which he had professed to convict. That section, as amended in 1909, declares that every one is guilty of an indictable offence “who knowingly, without lawful justification or excuse,—(a) makes, manufactures, or sells, or exposes for sale or to public view . . . any obscene book or other printed, typewritten or otherwise written matter, or any picture, photograph, model or other object tending to corrupt morals.” In the information laid against this defendant it was charged only that in the month of April, 1911, he, “contrary to law, exposed for sale and sold certain indecent and obscene books, tending to corrupt public morals, contrary to the form of the statute in such case made and provided.” It was not charged that he did it either knowingly or without justification or excuse. It was necessary to allege that he did it knowingly to bring it under that section. The information was not amended. He, therefore, was not charged with any criminal offence under that section. The words “contrary to law” and “contrary to the form of the statute” do not make up for the absence of that allegation of knowledge.

In the formal conviction, however, the words “knowingly” and “without lawful justification or excuse” are inserted in setting out the offence, which is otherwise described as in the information, except that the word “morals” is substituted for “public morals;” and the word “obscene” for “indecent and obscene.”

In his statement of the case for this Court, the learned Police Magistrate says: “The defendant elected to be tried summarily and pleaded not guilty. After hearing evidence, I was of the opinion that the charge was proved, and accordingly convicted the defendant, being satisfied that the books were obscene, and that the defendant knew that they were on sale in his establish-

ment." It is not specifically stated whether or not the Police Magistrate was satisfied that the defendant knew of the books being obscene, and we are as to that left to the inference to be drawn from the fact that he made the conviction. In his reasons for his decision, given at the time, he said, "The section of the Code under which this prosecution is brought is 207."

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It would, therefore, appear that the defendant was convicted of an offence with which he was not charged and for which he had not consented to be tried summarily.

As the charge was laid "*contra formam statuti*," and was dealt with under sec. 207, and the questions propounded refer only to that section, it is unnecessary to consider how far, at common law, a book-seller charged with selling and publishing an obscene libel, sold by his clerk in the course of his business, could shelter himself by his want of knowledge of the sale, or of the contents, or how far either must be brought home to him.

Dealing, then, with the case as one under sec. 207, there must be shewn knowledge of the sale or exposure for sale, and also knowledge of the character of the book. That the latter must be shewn was held by this Court in *Rex v. Beaver*, 9 O.L.R. 418. The former is also manifestly necessary. An auctioneer selling a library, or shelf or package of books, might not know what books it contained. Objectionable articles may be made or sold in a factory or shop; and, while the statute would be futile if the proprietor could escape because they were not made or sold directly by himself, but by his employees, though with his knowledge, it might also cause injustice if he could be punished because the making or selling was done for his benefit by his employees, though without his knowledge or consent, or even against his orders.

The only books specifically referred to in the evidence are three recent novels, which, for brevity, I may refer to as X, Y, and Z. There were, indeed, other books found along with these three in the cellar of the defendant's shop, but the Police Magistrate does not name them, and merely says that some of them were of the same type, and some of them he had looked through sufficiently to see that they all were more or less within the scope of the test of obscenity.

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Apart from evidence as to the character of the three books, X, Y, and Z, the prosecution contented itself with proving that a copy of Y had been bought on the 6th April at the defendant's shop from a clerk who brought it from the cellar; and that on the 8th April a Police Inspector went to the shop and there saw the defendant, who said that he had not a copy of X or Y; but the Inspector says, "On searching, we found," in a box in the cellar, eleven copies of X and thirteen of Y, besides other books, including one or more copies of Z, and that, in the defendant's presence, his clerk said that he had been selling the book Y, and he thought that the defendant knew it. It is not stated whether the defendant made any remark thereupon. Indeed, it is not said that he heard it. He was not asked about it when called in his own defence, and he did not refer to it.

It is not shewn that any of the public or customers were ever admitted to the cellar. There was, therefore, no evidence of exposure of any of the books for sale, and only proof of a sale of one copy of one book, Y, by the clerk, and no proof of the defendant's knowledge of the contents of any of the books. Z and the other unnamed books are not further spoken of, and may be left out of consideration.

For the defence, the defendant himself and four of his clerks gave evidence. It appears that his stock contains 150,000 to 250,000 books, of which 4,000 to 7,000 are kept in the cellar in stock. A clerk says the whole place is full of books, and another, that he "put the boxes of books down the cellar, and especially as at Christmas time there was not room for as much stock." The defendant says that in the cellar he has in stock a theological library and cook-books and other books that he has not room for in the shop. One department of the business is that of dealing in old or antiquarian books. One of his clerks, Appleton, who states that he looks after the sale of the new books, says that X came out in 1907, "and was sold by other dealers here before we had it." "We sold a great many copies till lately, and now we would not sell more than one a month or so." The defendant, himself, testified that he did sell them when they first came out, but "a year or more ago" he found in the invoices a shipment of X and Y, and he returned the books, as from what he heard he thought the tendency of



the books was suggestive, and so did not want to sell them; and he did not know, when the Police Inspector asked him about them, that he had a copy of either, and he had not read X nor Y, "nor such books." A clerk also testifies that, "a year ago or so," the defendant returned a shipment containing X and Y, "because they were not, I think, the class of books he desired to sell."

Even if we take these statements as going far enough to shew that the defendant knew that the books were obscene or such as tended to corrupt morals, it is evident that there is here no proof of a sale with his concurrence after he had learned of the objectionable character of the books.

Then it appears from the evidence of Appleton, who has charge of the sale of the new books, that "a year ago we got some twenty-five copies of each of these two books," X and Y, and "those found by the police were the remainder of that order." The invoice containing Y seems to have been produced by the witness before the Police Magistrate, but is not among the papers sent to this Court, and the exact date of it does not further appear. Appleton says: "The defendant probably did not know that I had ordered these books, as I am in charge of that branch." Another clerk says that the defendant is at the office in rear, and does not know what new books are in stock. Another says: "The whole place is full of books, 250,000 I would think. Appleton and I are in charge of the front of the shop. The defendant is at the office in rear, and looks after the old books. . . . The defendant does not know just what books we have bought, nor all we have in stock." Another clerk, Congdon, who says he is in charge of the antiquarian books, says that the defendant also looks after that department, and the defendant does not know what new books are in stock. The defendant, himself, says: "I am at the back of the shop, where the branches of the business I look after are situated: I do not attend to the new novels at all." He says that the clerk who ordered the last copies of these two books was in his employ when he returned the shipment, but he only remembered telling Congdon of having sent the shipment back, and he, Congdon, would have nothing to do with ordering these books—"they would likely be ordered by Appleton."

Bearing in mind the extent of the defendant's business, and

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the fact that the prosecution proved only one sale—and that by a clerk—of one book, without shewing that the defendant had any knowledge of its contents, can it be said that this evidence given for the defence affirmatively establishes knowledge by the defendant that this small order for these books had been given by his clerk, after he himself had sent back a shipment of these very books on account of their character? It may be said that, even taking the evidence for the defence, it is not absolutely clear that the defendant did not know of his clerk's order, whether at the time or afterwards, or of the receipt of the books thereunder, even though he thought that all had been sold; but it was for the prosecution to establish knowledge, not for him to shew want of knowledge; and, if the prosecution had had doubts upon the subject, it could have been cleared up by cross-examination. That not having been done, there was, in my opinion, failure of proof of knowledge of the sale, even in the sense of implied or tacit authority or consent to it; and, therefore, the second question should be answered in the negative.

It is unnecessary to answer the first question, as it becomes merely academic when the second is answered in the negative. No specific parts of any of the books have been referred to in the information, the conviction, the evidence, or in the argument. The statement by the Police Inspector as to the contents of X and Y was conceded to be at best inaccurate. No particulars seem to have been asked for by the defence, or delivered. The result would be that it would be necessary for the Court to peruse the books seized to see if it could discover any objectionable page, phrase, or sentiment, before it could answer the question propounded. In a sense this would be to ask the Court to be accuser instead of Judge. It is a course which should not again be adopted.

The defendant, on the evidence, should, in my opinion, have been acquitted, and the conviction should be declared invalid.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

*Conviction quashed.*

## [DIVISIONAL COURT.]

## BEATTY v. BAILEY.

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*Mortgage—Covenant for Payment Implied in Registered Charge under Land Titles Act—Action for Mortgage-money—Instrument not under Seal—Effect of Provisions of Act—Limitation of Actions—"Specialty"—Period of Limitation—Second Mortgagee—Cessation of Charge for Benefit of First Mortgagee—Sale under Power—Effect of, upon Right to Sue—Inability to Reconvey—Default of Mortgagor—Reservation of Rights.*

The defendant, in 1891, created a charge upon land which had been brought under the Land Titles Act, by an instrument, not under seal, in the form given in the schedule to the Land Titles Act then in force (No. 28 in the schedule to R.S.O. 1897, ch. 138). This was a second charge or mortgage upon the land, and payment of the moneys secured was to be made in 1894. The instrument was registered under the Act. It did not in terms contain a covenant for payment of the mortgage-money:—

*Held*, that, under sec. 34 of the Act (R.S.O. 1897, ch. 138), such a covenant was implied as against the person who created the charge, completed by registration; and an action upon that covenant was not barred by the lapse of less than twenty years from the date of default, which was not earlier than 1894, being (by the effect of the Land Titles Act, though the instrument was not under seal) an action upon a "specialty," within the meaning of the Statute of Limitations, R.S.O. 1897, ch. 72, sec. 1 (b)—a covenant contained in an indenture of mortgage made before the 1st July, 1894.

Sections 13, 34, 40(3), 41, 101, and 107 of the Land Titles Act, R.S.O. 1897, ch. 138, and sec. 102 of the Land Titles Act, 1 Geo. V. ch. 28, considered.

The second chargee, the plaintiff, in order to free the land for the benefit of the first chargee, in 1903 executed a cessation of his second charge, and that cessation was registered. By it he expressly reserved his rights against his mortgagor, the defendant, both for payment of the moneys secured by the charge and upon the covenants contained in the charge:—

*Held*, that the effect of the registration of the cessation was, upon sale by the first mortgagee, to give the purchaser an absolute ownership as to the land; but it left unimpaired the right of the plaintiff to proceed for the recovery of the amount due by the mortgagor, the defendant.

Although the mortgagee suing on a covenant in the mortgage must ordinarily be in a position to reconvey the land upon payment of what is due, that does not necessarily apply to the case of a second mortgagee whose rights against the land have been extinguished by the act of the first mortgagee. The inability of the mortgagee to convey will not bar the right of action on the covenant, if such inability arises from any default of the mortgagor. The mortgagor's duty was to pay off the first mortgage, and so prevent the exercise of the power of sale by which the equity of redemption was extinguished; and the loss of the land was occasioned, not by the action of the plaintiff in releasing his charge, but by the rights conferred upon the first mortgagee by his security, and by the default of the defendant himself.

*In re Burrell, Burrell v. Smith* (1869), L.R. 7 Eq. 399, applied and followed.

*Palmer v. Hendrie* (1860), 28 Beav. 341, distinguished.

Judgment of DENTON, Jun. Co.C.J., reversed.

AN appeal by the plaintiff from the judgment of DENTON, Jun. Co. C.J., dismissing an action brought in the County Court of York for the recovery of \$797.20, for principal and interest,

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upon the covenant implied in an instrument executed and registered for the purpose of creating a mortgage or charge upon land made subject to the Land Titles Act, R.S.O. 1897, ch. 138, now 1 Geo. V. ch. 28.

The following reasons for judgment were given by DENTON, Jun. Co. C.J.:—The facts of this case are not in dispute. On the 26th August, 1891, the defendant executed a charge under the Land Titles Act in favour of the plaintiff and one Boulton, for the sum of \$350 and interest, on property in Melbourne avenue, Toronto. This was a second mortgage; the first mortgage, for \$1,350, being at that time held by one Ferguson. On the 9th October, 1891, Boulton transferred his interest in the said charge to the plaintiff, who thereby became the sole owner of the charge. The defendant, on the 27th August, 1891, conveyed his equity of redemption to one Sarah Morrison, who continued for a short time to pay the interest on the mortgages. On the 1st November, 1892, Ferguson transferred his first mortgage to Janet Harvey. No interest or principal was paid on either of these mortgages subsequent to 1894. In 1903, Janet Harvey, the first mortgagee, sold the property, for a sum which was as much as could be got for the property at that time, but which was considerably less than her mortgage debt. In order to give a title, she had either to foreclose or obtain a release of the equity of redemption from Morrison and a discharge from the plaintiff, the second mortgagee. She chose the latter course; and, on the 30th March, 1903, Sarah Morrison transferred her equity of redemption to the first mortgagee. The plaintiff then executed a cessation or discharge of his mortgage, dated the 11th May, 1903.

This cessation contains the following clause: "Now, therefore, I hereby authorise the Master of Titles to notify on the register the cessation of the said charge as to the lands described therein, it being expressly understood that I, nevertheless, reserve all my rights, claims, and demands against the said George Bailey and Alexander Claude Foster Boulton and either of them, his heirs, executors, administrators, and assigns, both for payment of the moneys secured by the said charge and upon the covenants contained in said charge and in the transfer thereof, and that this authority shall not release, prejudice, waive, or affect any other



security or securities which I now have or which I may at any time hereafter obtain for the payment of the moneys secured by the said charge, it being my intention to retain all my rights, save the right to look to the said lands for the payment of the moneys secured by the said charge."

This action is brought on the covenant in the second mortgage to recover the principal and the interest that has accrued since 1894.

A discussion took place at the trial as to whether or not the action was barred by the Statute of Limitations. But, in the view I take of the case, it is unnecessary to consider that point.

It seems to me that the plaintiff cannot recover, and that for the reason that every mortgagor has a right to have a reconveyance of the mortgaged property, upon payment of the money due upon the mortgage; and that every mortgagee is charged with the duty of making such reconveyance upon such payment being made. *Walker v. Jones* (1866), L.R. 1 P.C. 50, is, I think, conclusive against the plaintiff's contention. In that case, as here, the mortgagee discharged the lands and premises from the security which he held, but purported to reserve to himself any other remedy or security which he had on promissory notes which the mortgage in question was given to secure. That is upon all fours with this case. Other cases upon the same line are: *Allison v. McDonald* (1893), 20 A.R. 695; *Rourke v. Robinson*, [1911] 1 Ch. 480; *Palmer v. Hendrie* (1859), 27 Beav. 349; *Perry v. Barker* (1806), 13 Ves. 198; *Gowland v. Garbutt* (1867), 13 Gr. 578; *Munsen v. Hauss* (1875), 22 Gr. 279; *In re Thuresson* (1902), 3 O.L.R. 271; *Mendels v. Gibson* (1905), 9 O.L.R. 94. These cases, it is true, are first mortgage cases, and it may be contended (though it was not dwelt upon in argument) that this rule does not apply to the case of a second mortgage. But, while there is, of course, a vast difference between a first and second mortgagee as regards the legal estate and the tenure and value of his security, is there any valid reason for refusing to apply this principle of law to each? A second mortgagee has vested in him an equity of redemption which he holds, as it were, in pledge. Upon repayment, the second mortgagee, by his discharge, revests in, or reconveys to, the person then entitled to it, his interest in the mortgaged premises, which is the

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equity of redemption. If the interest of the second mortgagee has been extinguished by the foreclosure of the first mortgage, then manifestly he has, through no fault of his own, nothing to reconvey; but, where he voluntarily discharges his interest in the lands from his second mortgage, even although this is done to assist the first mortgagee to obtain a clear title, it is not plain to me that the same rule of law ought not to apply.

In this case the plaintiff, by discharging the lands from the security which he held, voluntarily and effectually put it out of his power to reconvey his interest in the mortgaged premises. By that act, on the authorities cited, he has precluded himself from recovering against the mortgagor on the covenant.

The action will be dismissed with costs.

April 1. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

*W. J. Elliott*, for the plaintiff. No defence arises by reason of the Statute of Limitations. When the defendant released the land, he expressly reserved his rights under the covenant in respect of the moneys to be paid: *In re Richardson* (1871), L.R. 12 Eq. 398. The mortgagor was still bound under the covenant to pay imposed by statute; and the action is, therefore, one founded on a specialty, and is not barred until after twenty years from default: *Essery v. Grand Trunk R.W. Co.* (1891), 21 O.R. 224. See also R.S.O. 1897, ch. 138, sec. 107; and see the same section, as amended, 1 Geo. V. ch. 28, sec. 102, as to a seal being unnecessary. The learned County Court Judge has held that the plaintiff cannot recover, because every mortgagor has a right to have a reconveyance of the mortgaged property on payment of the money due upon the mortgage. But the inability of the mortgagee to reconvey will not bar the right of action on the covenant if such inability arises from any default of the mortgagor: Coote's Law of Mortgages, 7th ed., vol. 2, p. 982. If the mortgagor had paid off the first mortgage, the property would not have been sold under the power: *In re Burrell, Burrell v. Smith* (1869), L.R. 7 Eq. 399; *Drifill v. McFall* (1877), 41 U.C.R. 313.

*W. C. Chisholm*, K.C., for the defendant. The claim is barred by the Statute of Limitations, R.S.O. 1897, ch. 72, the debt no

being a specialty debt. The judgment of the learned County Court Judge is right and should be affirmed. The mortgagee must always be in a position to reconvey the land upon payment being made by the mortgagor. Here the plaintiff, by discharging the lands from the security which he held, negatived the possibility of reconveying. (Reference to the cases cited by the learned Junior Judge, *supra*.)

*Elliott*, in reply.

April 6. *BOYD, C.*:—The Land Titles Act was expressly designed to simplify titles and to facilitate the transfer of land; it is not intended to change or destroy civil rights and remedies. True it is that “seals” were in effect abolished as a necessary part of any instrument affecting land, and the forms given in the Act or approved by the Act for the transfer and the mortgaging or charging of land are to be without seals. This is intended to emphasise the fact that the virtue of the Act does not rest on the technical form and execution of the conveyance, but upon the fact of the instrument (whatever it is) being registered under the Act. It is the certificate of this registration held by the owner which corresponds to the ordinary possession of title deeds: R.S.O. 1897, ch. 138, sec. 101.

Section 13 provides that the first registration of any person as owner of land with an absolute title shall vest in that person an estate in fee simple. Section 33 provides for the mortgaging of registered land thus: every owner may charge the land with the payment at an appointed time of any principal sum, which charge shall be completed by entering on the register the person in whose favour the charge is made as the owner of the charge. Section 34 provides that, where such a registered charge is created on land, there shall be implied on the part of the owner of the land, his heirs, executors, etc., a covenant with the owner of the charge to pay the principal sum charged. And, by sub-sec. 2, where any charge, whether under seal or not, is expressed to be made in pursuance of the Act respecting short forms of mortgages, or refers thereto, then the form of words therein (according to the clauses numbered) shall have the same meaning and effect as are provided for in the Act as to short forms.

By sec. 40 (3), on the certificate of the owner of a charge autho-

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rising the discharge of any part of the land therefrom or any part of the money secured thereby, the Master may note on the register the discharge of such land from the charge or the discharge of such part of the money.

By sec. 41, every transfer of land under the Act is completed by entering on the register the transferee as owner; and till such entry the transferor shall be deemed to remain owner of the land.

Section 101 provides for the creation of a lien on the land, that is, in equity such as would arise out of a deposit of the title deeds.

Section 107 is thus expressed: "Notwithstanding the provisions of any statute, or any rule of law, any charge or transfer of land registered under this Act may be duly made under a charge or transfer without seal." By amendment made after and not affecting this transaction, this section is remodelled by declaring that the charge or transfer may be duly made by an instrument not under seal, and if so made, the instrument and every agreement, stipulation and condition therein shall have the same effect for all purposes as if it were made under seal (Land Titles Act, 1 Geo. V. ch. 28, sec. 102).

By the rules annexed to the Act, No. 71 directs the use of the forms given in the schedule, and form No. 28 is the form (not under seal) used in this case by the owner, Bailey, when he mortgaged to Beatty in August, 1891. That mortgage was to be paid in June, 1894, and in the case of an ordinary mortgage under seal the Statute of Limitations would bar at the end of twenty years—the mortgage being made before the 1st July, 1894 (R.S.O. 1897, ch. 72, sec. 1, sub-secs. (b) and (h)). In the form given by the Land Titles Act and in the instrument which was registered in this case there is nothing as to a covenant to pay; that term is supplied by the statute, in sec. 34, already quoted, *i.e.*, such a covenant shall be implied as against the owner of the land who creates the charge which is completed by the fact of registration. So that the obligation to pay, as by and under a covenant to pay, is to be regarded as a statutory obligation placed upon the owner for the benefit of the lender or chargee.

The additions to sec. 107 made by the amendment now appearing in 1 Geo. V. ch. 28, sec. 102, may prove useful in litiga-



tion arising upon the instrument in other jurisdictions; but do not seem to be needed in the present case.

The registered charge which is created *uno flatu* with the covenant to pay included or implied by virtue of the statute, is to be regarded as the effective and completed instrument, binding both land and person so far as security for the money advanced is concerned; and, though the land may be discharged by an act of grace on the part of the chargee, that does not *per se* relieve the covenantor from the payment of the debt till after twenty years have elapsed without action to recover the claim.

The release given by Beatty was limited to the land in question, and he expressly reserves his rights in respect of the moneys secured and to be paid. The effect is to free the land for the benefit of the first chargee, and so enable him to realise more speedily by sale of the estate, which was not worth what was due on the first charge. The effect of the registration of this cessation was, upon sale, to give the purchaser an absolute ownership as to the land, but to leave unimpaired the right of the plaintiff to proceed for the recovery of the amount due by the mortgagor, Bailey: *In re Richardson*, L.R. 12 Eq. 398; *Bell v. Rowe* (1901), 26 Vict. L.R. 511, *per* Madden, C.J.

The obligation to pay rests upon the covenant or contract imposed by statute; and is, therefore, an action founded upon a specialty, within the meaning of the Statute of Limitations, and is not barred by lapse of time less than twenty years from the date of default (which at the earliest was in this case 1894): *Cork and Bandon R.W. Co v. Goode* (1853), 13 C.B. 826; *Essery v. Grand Trunk R.W. Co.*, 21 O.R. 224, following *Ross v. Grand Trunk R.W. Co.* (1886), 10 O.R. 447.

No defence, therefore, arises by virtue of any Statute of Limitations or lapse of time.

The judgment below, therefore, should be entered against the defendant on this issue.

The next defence, and the one to which effect was given by the County Court Judge, rests upon the equitable situation of the parties, which I proceed to consider.

The first mortgagee had a power of sale by the terms of the mortgage and the statutory charge, and could enforce a sale against the mortgagor. It may be that the concurrence of the

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then owner of the equity of redemption and the second mortgagee assisted in the more inexpensive way of realising upon the property; but it is undoubted that the land was disposed of by the paramount act of the first mortgagee; and the law is, that, if a surplus remains unpaid after the exercise of a power of sale, the mortgagee may sue for its recovery by action on the covenant: *Rudge v. Richens* (1873), L.R. 8 C.P. 358. The release of the land by the second chargee was only to facilitate either the foreclosure or the sale of the property by the first mortgagee—as it appeared then that the land was not of value to satisfy even the first mortgage. Had the land been foreclosed by the first mortgagee, that change of the property would not have interfered with the right of the second mortgagee (who was not to blame) to sue upon the covenant. No doubt the rule is, that the mortgagee suing on a covenant in the mortgage must ordinarily be in a position to reconvey the land upon payment of what is due. But that does not necessarily apply to the case of a second mortgagee whose rights against the land have been extinguished by the act of the first mortgagee. The law is summarised in Coote thus, that the inability of the mortgagee to reconvey will not bar the right of action on the covenant if such inability arises from any default of the mortgagor: 7th ed., vol. 2, p. 982. The mortgagor's duty was, here, to pay off the first mortgage, and so prevent the exercise of the power of sale by which the equity of redemption was extinguished. I think the principles of decision acted on in *In re Burrell, Burrell v. Smith*, L.R. 7 Eq. 399, 466, apply to this case and go to invalidate the judgment pronounced by the learned County Court Judge.

I think judgment should be entered for the amount claimed with costs and costs of appeal.

LATCHFORD, J.:—I agree.

MIDDLETON, J.:—I entirely agree with my Lord the Chancellor, and only desire to add a few words out of respect to the learned Judge whose decision we are reversing.

The right of the mortgagor, when sued upon a covenant, to demand a reconveyance of the mortgaged property, discussed in *Kinnaird v. Trollope* (1888), 39 Ch.D. 636, and the cases there cited, and the equitable right to restrain such action when the mortgagee has put it out of his power to convey, cannot, it seems

to me, be invoked where the inability to reconvey arises from the default of the mortgagor himself. Here the non-payment of the first mortgage made the estate of the mortgagee absolute at law, and made the right of the plaintiff, as second mortgagee, liable to foreclosure in equity.

I do not think that the consent given by the plaintiff to the immediate exercise by the first mortgagee of his right to sell the lands operates to release the covenant. He has at most waived the taking of formal legal proceedings by the first mortgagee, which would not be to the advantage of any one; and, moreover, in his waiver he has expressly reserved his rights against the mortgagor.

It is clear, to me at least, that the loss of the property was occasioned, not by the action of the plaintiff, but by the rights conferred upon the first mortgagee by his security, and by the default of the defendant himself. This brings the case within the principle enunciated in *In re Burrell, Burrell v. Smith*, L.R. 7 Eq. 399.

In *Palmer v. Hendrie* (1860), 28 Beav. 341, the plaintiff failed to recover because he assented to the purchase-money being paid to the owner of the equity of redemption, instead of insisting upon it being applied in discharge of the mortgage debt. It was this, and not the concurrence in the sale, that was deemed improper

*Appeal allowed.*

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## [DIVISIONAL COURT.]

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RUDD V. CAMERON.

April 10

*Slander—Words Spoken of Plaintiff in Reference to his Trade—Publication—Speaking Brought about by Action of Plaintiff—Publication—Evidence for Jury—Privileged Occasion—Absence of Belief in Truth of Words—Malice—Damages—Quantum.*

In an action for defamatory words alleged to have been spoken by the defendant of the plaintiff in the way of his trade, the plaintiff testified that, having learned that statements injuriously affecting him were in circulation, and being unable to trace them to their source, he employed two detectives "for the purpose of ascertaining the facts and getting information for his solicitors." The detectives, having made the acquaintance of the defendant, told him that they were going to erect a club house, and that the plaintiff was anxious to secure the contract for building it. It was upon what the defendant then said that the action was based:—

*Held*, that, although the speaking of the words was brought about by the action of the plaintiff, there was evidence of publication for the jury. Review of the authorities.

*Duke of Brunswick v. Harmer* (1849), 14 Q.B. 185, followed.

*Held*, also, that, although the occasion on which the words were spoken was privileged, there was evidence, which the jury believed, that there was no truth in the statements made by the defendant; and evidence that he knew that they were untrue, or that he made them recklessly, not caring whether they were true or false; and evidence from which malice might be inferred.

*Held*, also, that, while the damages assessed by the jury (\$1,000) were substantial, they were not, in view of the defendant's conduct throughout and his not having gone into the box to testify on his own behalf, so excessive as to warrant the Court in setting aside the verdict.

Judgment of BRITTON, J., upon the verdict of a jury, affirmed.

AN appeal by the defendant from the judgment of BRITTON, J., of the 15th November, 1911, in favour of the plaintiff, upon the verdict of a jury at the trial at Pembroke, in an action for defamatory words alleged to have been spoken by the defendant of the plaintiff in the way of his trade.

February 27. The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., TEETZEL and KELLY, JJ.

W. M. Douglas, K.C., for the defendant, argued that there was no evidence of publication, and that the words were spoken on a privileged occasion, and there was no evidence of malice. In any event, the damages, if any, should have been merely nominal. On the question of publication, he contended that, where the plaintiff procures some one to go to the defendant for the purpose of provoking him to utter defamatory words, there is no publication. In support of this proposition he cited Starkie on



Slander, 3rd ed., pp. 381 and 514, where the cases of *King v. Waring* (1803), 5 Esp. 13, and *Smith v. Wood* (1813), 3 Camp. 323, are referred to; and *Weatherston v. Hawkins* (1786), 1 T.R. 110.

*E. F. B. Johnston*, K.C., for the plaintiff, urged that there was sufficient evidence of malice to take away the qualified privilege. He also pointed out that there had been no evidence called for the defence. As to publication, it was true that there were cases which said that if a trap were laid to make a man say what he would not have said voluntarily, there would be no publication. But here there had been no trap laid. The detectives did not go to the defendant to get him to make the slanderous statements, but to find out if he had been making them. There had been publication in this case. He referred to *Duke of Brunswick v. Harmer* (1849), 14 Q.B. 185.

*Douglas*, in reply, referred to *Odgers on Libel and Slander*, 5th. ed., p. 296.

April 10. The judgment of the Court was delivered by MEREDITH, C.J.:—The appeal is rested upon two grounds: (1) that there was no evidence of publication; and (2) that the occasion upon which the words were spoken was privileged and there was no evidence of malice; and it was also contended that the damages awarded (\$1,000) are excessive.

According to the testimony of the respondent, having learned that statements affecting him similar to those alleged to have been made by the appellant, and which form the basis of the action, were in circulation, and being unable to trace them to their source, he employed two detectives "for the purpose of ascertaining the facts and getting information for his solicitors," which I understand to mean for the purpose of finding out the author of the statements and bringing an action against him.

The detectives, having made the acquaintance of the appellant, adopted the ruse of telling him that they were going to erect a club house in the vicinity of Arnprior, and that the respondent was anxious to secure the contract for building it. Their object, no doubt, was to induce the appellant to speak his mind as to the respondent, and in this they appear to have succeeded, for it is upon what was then said by the appellant that the action is based.

The occasion upon which the words were thus spoken was

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privileged; but it is contended by the learned counsel for the appellant that, the speaking of them having been brought about by the action of the respondent himself, there was no publication; and in support of that contention he cited *King v. Waring*, 5 Esp. 13; *Smith v. Wood*, 3 Camp. 323, 14 R.R. 752; and Starkie on Slander, 3rd ed., pp. 381 and 514.

*King v. Waring* was an action for a libel contained in a letter written by the female defendant, and Lord Alvanley, C.J., having stated that it had been decided that giving a character to a servant however injurious to him, yet if fairly given, would not sustain an action, went on to say: "But if the letter was procured by another letter, not written with a fair view of inquiring a character, but to procure an answer, upon which to found an action for a libel, such evidence, I think, ought not to be admitted;" but, as the learned Judge held that this was not proved, his statement is but an *obiter dictum*.

In *Smith v. Wood*, the action was for a libel upon the plaintiff in the shape of a caricature print entitled, "The inside of a parish workhouse with all abuses reformed." A witness having stated that, having heard that the defendant had a copy of this print, he went to his house and requested liberty to see it, and the defendant thereupon produced it, and pointed out the figure of the plaintiff and the other persons it ridiculed; and this, Lord Ellenborough ruled, was not sufficient evidence of publication to support the action; and the plaintiff was nonsuited.

It does not appear from this statement of the facts that the plaintiff had sent the witness to request liberty to see the caricature. Mr. Odgers, however, in his work on Libel and Slander, 5th ed., p. 179, states as the facts of the case that "the plaintiff, hearing that defendant had in his possession a copy of a libellous caricature of the plaintiff, sent an agent who asked to see the picture, and the defendant shewed it to him."

In stating that the person to whom the caricature was shewn was sent to request that it should be shewn, Mr. Odgers is, I think, in error; and in this view I am supported by the report of the case and by what appeared in the earlier editions of Mr. Starkie's treatise, where attention is called to the fact that "there was no evidence to shew that the plaintiff was in privity with the witness:" 2nd ed., vol. 2, p. 87, note (i). In the same edition, vol. 1, p. 456,

the facts of the case are stated as they appear in the report in 3 Camp. See also 3rd ed., p. 381, and note (i) on p. 514; 4th ed. (Folkard), p. 374, note (s), p. 524, note (n); 5th ed. (Folkard) p. 409, note (f), p. 441, note k.; 6th ed. (Folkard), p. 409, note (f), and p. 441.

In the last edition of Folkard (7th ed.), *Smith v. Wood* is referred to, on pp. 166 and 263. In this edition the matter has been re-arranged, and the reference on p. 166 appears in chapter 11, which deals with communications in discharge of duty; and the statement in the text is, that, "where the publication of the defamatory matter was procured by the contrivance of the plaintiff, with a view to the foundation of an action against the defendant, the communication may be privileged on the ground that the plaintiff himself was the voluntary author of the mischief complained of;" and *Smith v. Wood*, *Weatherston v. Hawkins*, 1 T.R. 110, and *Warr v. Jolly* (1834), 6 C. & P. 497, are referred to as the authority for the statement.

The dictum of Lord Alvanley, C.J., in *King v. Waring*, and what was said by him in *Rogers v. Clifton* (1803), 3 B. & P. 587, at p. 592, are also referred to for the statement that, "where a plaintiff, knowing the character which his master will give, procures it to be given for the sake of founding an action upon it, he will not be allowed to recover."

The reference on p. 263 is merely a statement of the facts of *Smith v. Wood* and of the ruling of Lord Ellenborough, C.J., as reported in 3 Camp.

It would appear, therefore, that the first ground of appeal has no judicial decision, but only the *dictum* of Lord Alvanley, C.J., in *King v. Waring*, to support it.

Mr. Odgers points out (p. 180) that "in many of the older cases the Judges say, 'there is no sufficient publication to support the action,' when they mean in modern parlance that the publication was privileged by reason of the occasion;" and this may have been what was meant by Lord Alvanley, C.J., as, I think, appears from what was said by him in *Rogers v. Clifton*, 3 B. & P. 587, at p. 592. That was an action by a servant against his former master for an alleged libel contained in a letter written by the master to a Mr. Hand, to whom the plaintiff had applied for a place, and Lord Alvanley, speaking of this, said: "It is

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material also to observe that, when the plaintiff in this case applied to Mr. Hand for his place, and referred him to the defendant, he did not tell him that the defendant would give him a good character; had he done so, I should have suspected that he wished to lay a trap for the defendant, and procure evidence to support this action; in such a case I should hold a party not at liberty to ascribe the character given by his master to malice, when he had only drawn from him that which he had a right to expect."

However this may be, in the comparatively recent case of *Duke of Brunswick v. Harmer* (1849), 14 Q.B. 185, a different view was taken by the Court of Queen's Bench. The action was for libel published in a newspaper more than seventeen years before action; the Statute of Limitations was pleaded, and it was held that it was negatived by proof that a single copy had been purchased from the defendant for the plaintiff by his agent within six years. The libel was originally published in 1830; two copies of the newspaper were produced at the trial; one copy had been obtained from the British Museum, and the other had been purchased, before the commencement of the action in 1848, at the newspaper office of the defendant, by a witness who on cross-examination stated that he had been sent by the plaintiff to make the purchase and had handed the paper when purchased to the plaintiff. It was contended by the defendant that this latter was not such a publication as would support the issue. The presiding Judge overruled the objection. On a motion for a new trial the objection was renewed, and it was argued by counsel for the defendant that the publication proved was in law a publication to the plaintiff himself, and that it could not be the foundation of a civil action. Coleridge, J., in delivering the judgment of the Court, after referring to the facts and the contention of the defendant's counsel, said: "And, in some sense, it is true that it was a sale and delivery to the plaintiff; but we think it was also a publication to the agent. . . . The defendant, who, on the application of a stranger, delivers to him the writing which libels a third person, publishes the libellous matter to him, though he may have been sent for the purpose of procuring the work by that third person . . . The act is complete by the delivery; and its legal character is not altered, either by the plaintiff's procurement or by the subsequent handing over of the writing to him.



Of course that this publication was by the procurement of the plaintiff is not material to the question we are now considering."

In the view of Mr. Odgers, pp. 179-180, this case, so far as the question of publication merely is concerned, overrules *King v. Waring* and *Smith v. Wood*; and Sir Frederick Pollock's note to *Smith v. Wood* (14 R.R. 752) is, that Lord Ellenborough's ruling "does not seem consistent with *Duke of Brunswick v. Harmer*."

Neither *King v. Waring* nor *Smith v. Wood* was cited or referred to in *Duke of Brunswick v. Harmer*; the former probably for the reason suggested by Mr. Odgers, that it related only to the question of privilege; and the latter for the same reason, if the facts of it were as stated by Mr. Odgers, or for the reason that it had no application, if the facts were as stated in the report in 3 Camp.

The question has been discussed and passed upon in many cases in the United States, and among them in *Gordon v. Spencer* (1829), 2 Blackf. (Ind.) 286, 288; *Yeates v. Reed* (1838), 4 Blackf. (Ind.) 463, 465; *Jones v. Chapman* (1839), 5 Blackf. (Ind.) 88; *Haynes v. Leland* (1848), 29 Me. 233, 234, 243; *Sutton v. Smith* (1850), 13 Mo. 120, 123, 124; *Nott v. Stoddard* (1865), 38 Vt. 25, 31; *Heller v. Howard* (1882), 11 Ill. App. 554; *White v. Newcomb* (1898), 25 App. Div. N.Y. 397, 401; *O'Donnell v. Nee* (1898), 86 Fed. Repr. 96; *Railroad v. Delaney* (1899), 102 Tenn. 289, 294, 295; and *Shinglemeyer v. Wright* (1900), 124 Mich. 230, 240. See also Cyc., vol. 25, pp. 370-1. In most of these cases the supposed ruling of Lord Ellenborough, C.J., in *Smith v. Wood* and the opinion expressed by Lord Alvanley, C.J., in *King v. Waring* were recognised as correct statements of the law, and followed.

Upon the whole, we are of opinion that we should follow *Duke of Brunswick v. Harmer*, and, following it, hold that there was evidence for the jury of publication, and that the first objection, therefore, fails.

The second ground of appeal also fails; there was evidence, which the jury believed, that there was no truth in the statements made by the defendant; and there was ample evidence, out of the appellant's own mouth on his examination for discovery, that he knew they were untrue, or that he made them recklessly, not caring whether they were true or false; and there was evidence from which

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malice might be inferred, in the bad feeling which had existed on the part of the appellant towards the respondent, and his statements to the respondent's book-keeper and stenographer, Alice Miller.

The damages are substantial; but, in view of the appellant's conduct throughout and his not having gone into the box to testify on his own behalf, we cannot say that they are so excessive as to warrant the Court in setting aside the verdict.

The appeal is dismissed with costs.

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[IN CHAMBERS.]

RE CONSTANTINEAU AND JONES.

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April 11.

*Costs—Criminal Proceedings—Order for Payment by Prosecutor of Costs of Accused—Taxation—Right of Appeal—Criminal Code, secs. 689, 1047—Construction of Order—Right to Costs of Preliminary Inquiry before Police Magistrate—Mandatory Order.*

No appeal lies from the taxation of costs pursuant to an order of the Court, under sec. 689 of the Criminal Code, for payment by the prosecutor of the costs of the accused.

Section 1407 of the Criminal Code is wide enough to apply to all costs ordered to be paid under any of the earlier provisions of the Code; and, there being no tariff of fees provided with respect to criminal proceedings, the tariff in force with respect to the costs of civil proceedings is applicable; but the right of appeal given in civil cases is not made to apply by the mere introduction of the civil tariff.

The order for payment of costs recited the information laid against the accused before a Police Magistrate, the committal of the accused for trial, and the notice of discontinuance given by the complainant; and the award was "of the costs occasioned by the said proceedings:"—

*Held*, that the order adequately awarded the costs of the preliminary inquiry before the Police Magistrate; and that, upon the true construction of sec. 689, where costs are awarded in general terms, these include the costs of the appearance on the preliminary inquiry.

A mandatory order was made directing the local officer who had taxed the costs under the order to tax and allow to the accused his costs of the preliminary proceedings before the Police Magistrate.

AN information was laid by Constantineau against Jones before the Police Magistrate at L'Orignal for the publication of a defamatory libel. Jones was committed for trial, and at the assizes was surrendered by his bail; but, the prosecutor not appearing, was discharged; and an order was made by LATCHFORD, J., for the recovery by the accused (Jones) from the prosecutor (Constantineau) of his (Jones's) costs occasioned by the proceedings, the same to be taxed.

A bill of costs was brought in before the Local Registrar covering the proceedings before the Police Magistrate, as well as those at the assizes; but the Local Registrar, upon taxation, disallowed entirely the costs of the proceedings before the Police Magistrate, and largely reduced the bill in respect of the costs incurred at the assizes.

Jones appealed from the taxation.

April 9. The appeal came on for hearing before MIDDLETON, J., in Chambers.

*G. A. Urquhart*, for the appellant.

*H. S. White*, for Constantineau, objected that there was no appeal from the taxation, as the proceedings were under the Criminal Code, and the provisions of the Consolidated Rules did not apply.

April 11. MIDDLETON, J. (after setting out the facts as above):—I think this objection is well taken. The section of the Criminal Code under which the order for payment of these costs was made is sec. 689.\* It merely gives authority to direct payment of costs. Section 1047,† I think, is wide enough to apply not only to costs ordered to be paid under secs. 1044 and 1045, but to apply to all costs ordered to be paid under any of the earlier provisions of the Code. This section indicates that where there is no tariff provided in respect to criminal proceedings, costs shall be taxed according to the lowest scale of fees allowed in the Court in which the proceeding is had in a civil suit. Power is given under sec. 576 to the Court to provide by general rule for the costs to be allowed; but no tariff has been promulgated under the Code; and, therefore, the tariff applicable in civil proceedings, and provided by the Judicature Act and Rules, is applicable; but under the Code no appeal is given, nor is the right of appeal which is found in civil cases made to apply by the mere introduction of the civil tariff.

\* 689. If the prosecutor so bound over at his own request does not prefer and prosecute such an indictment, or if the grand jury does not find a true bill, or if the accused is not convicted upon the indictment so preferred, the prosecutor shall, if the court so direct, pay to the accused person his costs, including the costs of his appearance on the preliminary inquiry.

† 1047. Any costs ordered to be paid by a court pursuant to the foregoing provisions shall, in case there is no tariff of fees provided with respect to criminal proceedings, be taxed by the proper officer of the court according to the lowest scale of fees allowed in such court in a civil suit.

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Upon the argument it was suggested that another remedy might be open to the applicant, in so far as the Taxing Officer has failed to allow anything for the costs incurred upon the preliminary inquiry.

I am quite clear that, in the absence of any appellate jurisdiction, I have no right to interfere with the discretion of the officer whose duty it is to tax these costs; but it seems to me to be equally plain that where the Taxing Officer has failed to discharge his function at all, and has failed to make any allowance for the costs of the preliminary inquiry, the applicant has the right to come to this Court to compel the officer to exercise his function; and it was arranged by counsel that, to save the expense of another application, this may be treated as a motion for a mandatory order, and that I should deal with the questions which would be open upon such an application.

The Taxing Officer has proceeded upon the theory that the trial Judge did not intend to award the costs of the preliminary inquiry, and that the language used in the judgment is not sufficient to award these costs. I have had the opportunity of consulting the learned trial Judge, and he tells me that it was his intention to make an unrestricted award of all costs over which he had any jurisdiction; and I think that the judgment adequately awards the costs of the preliminary inquiry.

The formal judgment entered recites the information before the Police Magistrate and the committal and the notice of discontinuance given by the complainant; and the award is "of the costs occasioned by the said proceedings."

In the second place, I think that, upon the true construction of sec. 689, where costs are awarded in general terms, these include the costs of the appearance on the preliminary inquiry. The word "including" is equivalent to, "which are to include." It would have been well, when the judgment was settled, to have avoided any question by following the precise words of the statute; but, when I find that the words are capable of the wider meaning, and that the learned trial Judge intended his judgment to have the wider meaning, I have no hesitation in giving to the words used a meaning which conforms to the actual intention.

The motion thus amended will be dealt with by determining that I have no appellate jurisdiction, and cannot, therefore, deal



with the appeal, as an appeal; but a mandatory order will go to the local officer directing him to tax and allow to the applicant (Jones) his costs of the preliminary proceedings before the Police Magistrate. As success is divided, I make no award of costs.

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## [IN THE COURT OF APPEAL.]

## RE MOUNTAIN.

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*Will—Construction—Secured Debts—Postponement of Payment—Accumulation of Income—Exoneration of General Estate—Charitable Gift—Immediate Vesting—Condition—Gift over to Charity—Rule against Perpetuities—Restraint on Alienation—Election between Gifts—Questions for Determination upon Summary Application for Construction of Will—Costs.*

The testator, who died in 1910, by his will, made in 1902, directed that his just debts and general expenses should be paid as soon as possible after his decease; but that the payment of debts secured by mortgages on real estate or for which his bank stock had been temporarily transferred should be postponed until they had been paid off from the income of his estate; and that none of his bank stock or other securities were to be sold, but were to be distributed according to their market value at the time of distribution. He also directed that his real estate in the Isle of Wight was not to be sold till after a tunnel or bridge should be made between the island and the mainland, if such should be made within the lifetime of any of his executors or twenty-one years after. He then gave all his property to his executors, "after payment of my just debts and funeral expenses as aforesaid, to be held in trust for certain purposes specifically set out in a number of separate paragraphs. The first was, out of the revenue of his property to pay his wife £150 a year, and to allow her the use, rent free, during her life, of "Pinehurst House, furnished, or of whichever house of mine may be our home at time of my decease." In the 11th paragraph, he specified a number of parcels of real estate, and directed that all these should be conveyed to the Synod of the Diocese of Ottawa to be held by the Synod in trust for an endowment of the bishopric of Cornwall, "whenever the Bishop of Cornwall is being appointed. If the yearly income from said properties, together with any other official income from whatever source, be insufficient to produce a salary of \$2,000 a year for a suffragan Bishop or \$3,000 yearly for an independent Bishop . . . the income of my sixty Hudson Bay shares . . . or such part . . . as may be requisite shall be applied towards the same object." Paragraph 12: "But if it be unnecessary for said purpose so to apply the income of said sixty Hudson Bay shares . . . I hereby bequeath these . . . shares to the University of Bishop's College, Lennoxville . . . to found and endow . . . a Mission Fellowship." Paragraph 19: ". . . As soon as the obligations on my personal and real estate have been discharged, including the payment of \$5,000 to the University of Windsor, N.S., for which I gave 'my note of hand,' then all my real estate in" (three specified places) "shall be transferred to the Synod of the Diocese of Ottawa to be held in trust for the proposed new Diocese or suffragan Bishop of Cornwall . . . subject to the claim of residence, in one or other of my houses, of my . . . wife . . . After all existing claims on my estate real and personal as hereinabove described shall have been satisfied then the accumulation of all rents shall be safely invested to

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form a fund for duly fitting up the house" (describing it) "as a suitable residence for the future Bishop of Cornwall . . ." Paragraph 20: "I have made all the above bequests to the suffragan bishopric or independent See of Cornwall . . . But if the appointment . . . of such a bishop do not take place within twenty-five years after my death . . . the properties which had been intended for the endowment of the See of Cornwall shall also by transfer become the property of Bishop's College, Lennoxville, subject to" (certain charges) "and in trust towards the endowment of a Professorship of Natural Science." Upon appeal from an order made upon summary application under Con. Rule 938:—

*Held*, that the gift to the Synod was not void as offending the rule against perpetuities: it was a vested charitable gift, but to be divested in a certain event, also in favour of a charity.

*Held*, also, that the income might be applied to the exoneration of the general estate, to the extent, if any, to which it might be called upon to answer the secured debts.

*Held*, as to conditions in the will said to be in restraint of sale of certain portions of the testator's estate, and as to the alleged obligation of the testator's widow to elect between the gifts to her of a life estate in the testator's Cornwall house and in a house in the Isle of Wight, that the questions submitted could not be determined upon the present application.

*Held*, also, that the Court should not disturb the disposition of the costs made by the order in appeal, by giving the Synod costs as between solicitor and client.

*Per Moss, C.J.O.*:—In such cases, the award of costs as between solicitor and client is generally confined to the applying trustee or executor. Judgment of BOYD, C., varied.

MOTION by the executors of the will of the Reverend Jacob Jehoshaphat Salter Mountain, deceased, upon originating notice, for an order determining certain questions arising in the administration of the estate of the deceased, involving the construction of his will and codicils.

The testator died on the 1st May, 1910. His will was dated the 25th June, 1902. The material parts of it were as follow:—

1stly. I will and direct that all my just debts and the expenses of my funeral . . . be fully paid and discharged as soon as possible after my decease.

Nevertheless the payment of debts secured by mortgages on real estate, whether in Canada, the Isle of Wight, or elsewhere, or those for which an equivalent portion of my bank stock has been temporarily transferred, shall be postponed until they have been paid off from the income of my estate. And none of my bank stock or other securities are to be sold, but are to be distributed according to their market value at the time of distribution.

My real estate in England or the Isle of Wight is not to be sold till after a tunnel or bridge is made between said Isle and the mainland (if such should be made within the lifetime of my

executors or twenty-one years after), after which time it may be sold, if my executors should consider that such sale would benefit my estate.

2ndy. I will devise and bequeath to my executors all my property estate and effects real and personal movable and immovable of whatsoever kind or nature and wheresoever situated or to be found which may belong to me at the time of my decease after payment of my *just* debts and funeral expenses as aforesaid to be held in trust for the following purposes, that is to say:—

1st. Out of the revenue thereof, to pay to my wife Louisa Mira yearly (for as long a time as she may outlive me, except as hereinafter provided) one hundred and fifty pounds, the same as I mentioned in a codicil to my last will which codicil was signed after our marriage at Shanklin, Isle of Wight, and a duplicate of it left with her sister Kate, said sum to include her right of dower, and to be made up partly of what would be a fair rent for my executors to charge on my property now called “Mira Cottage” on the Winthrop Highlands, in the suburbs of Boston, Mass.—or in case of this property being sold, of five per cent. interest on the proceeds. . . .

She is also to have the use, rent free, during the time of her natural life, of this “Pinehurst House,” furnished, or of whichever house of mine may be our home at time of my decease. . . .

2nd. To pay four thousand dollars towards the endowment of the “Bishop George Jehoshaphat Mountain Memorial Mission Fund” now in process of formation for the support of Missions within the territory which now forms the Diocese of Quebec—so soon as another four thousand dollars shall have been added to said fund by individual subscribers after my death. . . .

[Then followed a number of small legacies.]

9th. To allow the Rev. S. Gower Poole, or the future Rector or Rectors of the Church of the Good Shepherd, to reside in the house now occupied by him, unless Cornwall should become the See of a Diocese or a suffragan bishopric, in which case I desire his present abode to become the episcopal residence, when he (unless he were the chosen bishop) or his successor in office would have to return to his former residence . . .

10th. Two shares of my Montreal bank stock to be transferred to the names of “the Rector and Church Wardens of the Church

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of the Good Shepherd" and the interest of said shares to be used for repairs to said Church and the houses thereto belonging. This is to be called "the Church and Church Property repair fund."

11th. All the property purchased by me from the executors of the John Purcell estate—also lot No. 2 on Second street, formerly known as "the Cattanach property" but now belonging to me (on which I would recommend the erection of two double semi-detached houses and one single house)—Also my property on "First" and "Amelia" streets bordering on or opposite to the "Central Park"—Also my property No. 2 on Park Avenue Winthrop Highlands near Boston Mass. U.S. (after the death of my dear wife, who meanwhile has the profits)—Also the tract of Prairie land half a mile square more or less, which I hold near Qu'Appelle, N.W.T.—if still unsold, or, if sold, the proceeds of the sale—Also my properties in the Isle of Wight, England, if still unsold, or, if sold, the proceeds of the sale or an equivalent thereto—All these properties I desire to be legally conveyed to the Synod of the Diocese of Ottawa to be held in trust by said Synod for an endowment of the bishopric of Cornwall whenever the Bishop of Cornwall is being appointed, whether as an independent Bishop or as a suffragan to the Bishop of Ottawa. If the yearly income from said properties, together with any other official income from whatever source, be insufficient to produce a salary of two thousand dollars a year for a suffragan Bishop or three thousand dollars yearly for an independent Bishop, then, in such case, the income of my sixty Hudson Bay shares (the certificates of which are now deposited, for safe keeping, with the Parr's Bank Limited in the Consolidated Bank Building, Threadneedle Street, London, E.C., which also receives and places to my credit account the yearly dividends) or such part of the said income of these 60 shares as may be requisite shall be applied towards the same object.

12th. But if it be unnecessary for said purpose so to apply the income of said 60 Hudson Bay shares (which must in time become more and more valuable in proportion as the value of land increases in these territories and which shall not be sold, nor any of my previously mentioned properties in Cornwall, during the lifetime of the Rev. Arthur Jarvis or that of any of his



children now living and twenty-one years after), then in this case I hereby bequeath these Hudson Bay shares to the University of Bishop's College, Lennoxville, and constitute said corporation my residuary legatee, so far as said shares are concerned, upon the following trust and conditions that is to say: To found and endow in said college a Mission Fellowship whose Fellow shall be appointed, and his duties assigned as follows . . .

The stipend of the Mission Fellow shall, to the extent of twelve hundred dollars a year, be the first charge on said Hudson Bay shares. The Mission Fellow shall be called "The Jacob Mountain Mission Fellow of Bishop's College Lennoxville."

13th. If and as soon as from the above named and other available sources a larger income than two thousand dollars annually shall arise and be derived, then I will devise and bequeath, in such case and as soon as practicable, that one hundred dollars or whatever portion of it may be in hand be paid yearly toward the stipend of the Rector or Incumbent of the Mountain Family Memorial Church of the "Good Shepherd" East Cornwall. . . .

19th. It is my desire further that as soon as the obligations on my personal and real estate have been discharged, including the payment of five thousand dollars to the University at Windsor, N.S., for which I gave "my note of hand," then all my real estate in Cornwall, Ont., in the Isle of Wight, or, if this should have been already sold, according to the instructions herein contained, the proceeds of such sale, and the property in the Winthrop Highlands near Boston, Mass., U.S., shall be transferred to the Synod of the Diocese of Ottawa to be held in trust for the proposed new Diocese or suffragan Bishop of Cornwall, Ont., subject to the claim of residence, in one or other of my houses, of my dear wife during the time of her natural life.

Also it is my desire that after all existing claims on my estate real and personal as hereinabove described shall have been satisfied then the accumulation of all rents shall be safely invested to form a fund for duly fitting up the house in which Mr. Poole now lives, as a suitable residence for the future Bishop of Cornwall . . .

20th. I have made all the above bequests to the suffragan bishopric or independent See of Cornwall (which is to be called "The Mountain Memorial Bishopric of Cornwall") in the hope

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that its northern boundary will be the Ottawa River including the Island of St. Pierre and all the other islands between the Cascades and the Island of Montreal.

But if the appointment and consecration of such a bishop do not take place within twenty-five years after my death, then and in such case the properties which had been intended for the endowment of the See of Cornwall shall also by transfer become the property of Bishop's College Lennoxville, subject to the annual payment of said one hundred dollars to the rector or incumbent of said Church of the "Good Shepherd" and other bequests herein made chargeable on said property and the privileges herein conferred and in trust towards the endowment of a Professorship of Natural Science. . . .

[The testator then appointed executors and trustees.]

The first codicil was dated the 6th April, 1903, and contained the following provisions, among others:—

Owing to serious losses and many expenses and disappointments since Bishop Dunn of Quebec proposed the formation and endowment of the Bishop George Jehoshaphat Mountain Memorial Mission Fund—now in process of formation, I am led to reduce, as I hereby do reduce, my bequest to said fund to one thousand five hundred dollars, payable by my executors as soon as fifteen hundred dollars shall have been otherwise contributed towards said fund, and this within five years after my death. In default of which said sum being otherwise contributed within said time said fund shall have no claim on my estate. . . .

I also direct that the five thousand dollars referred to in my . . . will . . . as set apart for the benefit of the University at Windsor, Nova Scotia, be paid by my executors to the Alumni Association of King's College, to be held by them in trust for said University, on condition, etc

The second codicil was dated the 7th August, 1905, and was as follows:—

Know all men by these presents that I, Rev. Canon Mountain, D.C.L., D.D., and now of Yarbridge, Brading, Isle of Wight, England—do hereby assign and make over to my dear wife—Louisa Mira the use of my Bungalow here situated, together with that of the adjoining cottage now occupied by Moses Cooper (after the time of his decease) to have and to hold the same after

my death, and to receive the rents therefrom during the period of her natural life.

All be it that this codicil, made on the seventh day of August 1905 (nineteen hundred and five) and signed in the presence of two witnesses within said Bungalow, does not affect the terms and conditions of my last will and testament of which a copy was left with my agent R. Smith Esq. the lawyer of Cornwall, Ont. Canada.

The deed of gift contained in this codicil is free from all mortgage claims and legacy duties.

The third codicil was dated the 29th May, 1909, and was unimportant, except as confirming the will and referring to the testator's property in the Isle of Wight as his "temporary residence."

The questions for determination submitted by the executors were the following:—

1. What portion, if any, of the estate of the deceased is undisposed of by the said will and codicils thereto, and is to be distributed according to the Statute of Distributions ?

2. What assets or properties of the deceased the said executors are entitled to convert into cash for the payment of the debts of the deceased, and as to the validity and effect of the directions and provisions made in the said will and codicils in restraint of sale of the various properties of the deceased.

3. The fund from which debts secured by mortgages on real estate and by transfer of bank stock are to be paid off.

4. The fund or property from which the executors are to pay off the various general legacies contained in the said will and codicils and the annuities to his widow and others.

5. How the executors are to dispose of the income and capital of the Hudson Bay shares mentioned in the said will.

6. What obligations on personal and real estate are referred to in clause 19 of the said will and what fund the \$5,000 bequeathed to the University at Windsor, N.S., is to be paid from.

7. When and upon the fulfillment of what conditions the property devised to the Synod of the Diocese of Ottawa is to be transferred to the said Synod.

8. What claims on real and personal estate are referred to in clause 19 of the will, and how and out of what fund the executors are to satisfy the same, and what is meant by the expression in

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clause 19 "accumulation of rents," and how the same are to be applied by the executors.

9. What buildings or erections or repairs the executors should undertake pursuant to clauses 11 and 19 of the will and the codicil thereto dated the 6th April, 1903.

10. What houses the widow of the deceased is entitled to occupy or receive the rents for.

11. The general construction of the will and codicils and the advice of the Court as to the proper manner of dealing with and distributing the estate of the deceased.

November 9, 1910. The motion was heard by BORD, C., in the Weekly Court at Toronto.

*R. Smith*, K.C., for the executors.

*Glyn Osler*, for M. Beatrice Lloyd and Rose McCaskell, two of the next of kin of the testator.

*J. A. Macintosh*, for Salter M. Dickinson and others, also next of kin.

*Travers Lewis*, K.C., for the Synod of the Diocese of Ottawa.

*D. C. Ross*, for Bishop's College, Lennoxville.

November 14, 1910. BORD, C.:—By carefully spelling out this complicated will, it appears that the testator provided for the payment of his obligations by a double process, and for that purpose divided his debts into two classes: (1) what he calls his "just debts;" and (2) debts secured by him on land or personalty.

He first provides for the payment of his "just debts" and funeral expenses as soon as possible after his death, and then makes the exception that the payment of debts (a) secured on real estate or (b) those for which his bank stock has been transferred, should be postponed till they have been paid off from the income of his estate.

The distinction is again marked when he transfers all his property to his executors; this is so transferred "after payment of his just debts and funeral expenses," to be held by them in trust. He then, in the 11th paragraph, provides for the transfer of lands in trust to the Synod of the Diocese of Ottawa; but this is to be read in connection with the 19th paragraph, by which it is provided that this transfer is to be made as soon as "the obligations of my personal and real estate have been discharged;"



and, later in the same paragraph, he says: "After all existing claims on my estate real and personal as hereinabove described shall have been satisfied then the accumulation of all rents shall be safely invested," etc.

All these indicate and direct a gathering in and application of income from the whole estate, vested already in the executors, in order thereout to pay the secured debts, which are, therefore, not to be paid in ordinary course out of all available assets forthwith, but to be paid from time to time as the income permits till all are finally satisfied.

It is uncertain rather in what category the obligation to Windsor University is. By the 19th paragraph of the will, it is classed with "the obligations on his real and personal estate." But the codicil of the 6th April, 1903, would rather go to indicate a payment at one time. No information has been obtained from the University as to the nature of the claim which may exist against the testator, and I can add nothing to what I have said. My judgment is, that the payment of these secured claims is to be made out of accruing income of the estate by the executors—assuming, that is, that the creditors are willing to wait. But, if the claim is enforced by the creditors, I do not see that the next of kin have any equity or status to require the executors to postpone dealing with respect to the other trusts of the estate, for so long as it might have taken to accumulate enough to pay all these secured claims in the manner directed by the testator. The legal rights of the secured creditors would frustrate the delay contemplated by the testator, but *cui bono*? Surely for the advantage of the beneficiaries under the will. The testator's object in accumulating the rents is thereout to have the creditors paid; but the object of accumulation ceases when the creditors enforce payment out of the general assets in the usual course of administration. I think his intention is clear to exonerate the lands and property charged with debts from the payment of the charges by the beneficiaries. The general estate is to pay all debts sooner or later.

As soon as the obligations on the real and personal estate are satisfied, then the trust arises in respect of the lands. It was agreed during the argument that an accumulation of income would be required for about five years in order to pay all these se-

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cured debts thereout. The lands are then to be conveyed to the Synod of the Diocese of Ottawa, to be held in trust for the endowment of a suffragan bishopric of Cornwall. But, the will proceeds, if the accomplishment of the said suffragan bishopric is long delayed . . . if the appointment and consecration of such Bishop do not take place within twenty-five years after my death, then the properties intended for the endowment of the See of Cornwall shall by transfer become the property of Bishop's College, Lennoxville.

The will was made on the 25th June, 1902, and the last codicil confirming his will was made on the 29th May, 1909, and the testator died, in the Isle of Wight, on the 1st May, 1910. The appointment of any Bishop for a Diocese of Cornwall has not yet taken place—though some steps have been taken towards the establishment of a coadjutor bishopric in that locality. But the matter has in no sense reached that point of completion required by the testator. The question is, whether the trust to convey by the executors of the testator is to remain in abeyance for twenty-five years from his death or for such lesser period as may elapse before a coadjutor or suffragan Bishop has been appointed and consecrated for the new See of Cornwall, or is it a void bequest by reason of infringing the rules against remoteness? Even if the conveyance to the Synod was not to be made till the Bishop was appointed, it may be persuasively argued that the testator was aware of the condition of his estate, and contemplated that some five years would elapse from his death before the lands were to be taken out of the hands of the executors—they holding them under the trust to satisfy, first, the secured creditors before the claim of the Synod arose. Thus, in the view of the testator, five years would be occupied in clearing the real estate, and only an interval of twenty years would be the period of suspense as to whether or not a Bishop should be appointed. That length of time would not be objectionable in point of remoteness.

But I prefer that reading of the will which would call for the conveyance of the lands to the Synod forthwith upon the satisfaction of the secured debts—by that body to be held in trust expectant upon the episcopal appointment for the period of twenty-five years from the testator's death—with provision for the transfer of the lands by the Synod to the Lennoxville College,

if no Bishop had been duly appointed before the end of the twenty-five years.

The language of the testator permits of this construction, and the Court will be slow to seek to frustrate his general charitable purpose.

All the real and personal estate is vested in the executors to hold in trust . . . for the purpose, as to the lands mentioned, of being "legally conveyed to the Synod of the Diocese of Ottawa to be held in trust by said Synod for an endowment of the bishopric of Cornwall whenever the Bishop of Cornwall is being appointed" (*sic*).

Again, in paragraph 20, he adverts to this trust conferred by the earlier clause on the Synod of Ottawa, in this way: "If the appointment . . . of such a Bishop do not take place within twenty-five years after my death, then and in such case the properties which had been intended for the endowment of the See of Cornwall shall also by transfer become the property of Bishop's College, Lennoxville." That is, as I read it, the then trustees for the Synod shall, at the end of the twenty-five years (if no Bishop is appointed), transfer what they hold to the trustees of the college "in trust towards the endowment of a Professorship of Natural Science."

In brief, after payment of the secured debts, the real estate held in trust is to be conveyed in fee simple to the Synod, subject to be divested if a Bishop is not appointed in twenty-five years, in favour of the college.

Here is found an immediate gift for charitable uses, delayed as to the actual conveyance till the secured debts are paid, and, therefore, vested at the death and effective in law, though the particular application of the gift may be in suspense for twenty-five years or may never take effect at all—in which contingency there is a valid transfer to another charity at the end of the twenty-five years. *Chamberlayne v. Brockett* (1872), L.R. 8 Ch. 206, lays down the general principle, and there is a particular application of it in *In re Swain*, [1905] 1 Ch. 669, which is much in point as to the scheme of this will.

The disposition of the lands to the first charity (the Synod) being valid, the provision for the transfer in certain events to the second charity (the college) is also a valid charitable bequest:

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*Christ's Hospital v. Grainger* (1848-9), 16 Sim. 83, affirmed 1 Macn. & G. 460.

The testator had sixty Hudson Bay shares of considerable value, which are held by the executors in trust for the payment of debts as aforesaid. I have considerable doubt as to their future disposal. They are mentioned specifically in connection with the endowment of the new bishopric and the lands intended therefor. The will reads (paragraph 11): "If the yearly income . . . together with any other official income from whatever source, be insufficient to produce a salary of \$2,000 a year for a suffragan Bishop . . . then, in such case, the income of my Hudson Bay shares . . . or such part of the said income . . . as may be requisite shall be applied towards the same object." Paragraph 12: "But if it be unnecessary . . . so to apply the income of said 60 Hudson Bay shares . . . then . . . I hereby bequeath these . . . shares to the University of Bishop's College . . . and constitute said corporation my residuary legatee, so far as said shares are concerned, upon the following trusts and conditions" (*i.e.*, to found a Mission Fellowship, etc.).

I incline to think that the shares, after debts satisfied, are to be held by the Synod of the Diocese to accumulate the income for the purposes of the expected endowment of the new bishopric; and, if and when that is established, within the twenty-five years, to apply the accumulated as well as the yearly accruing income in payment of the salary named. If there is a surplus, or the bishopric is not created within the period, then that surplus or the shares themselves are to be transferred to Bishop's College. That is to say, the final beneficiary takes in subordination to the prior beneficiary, and only so much as can be called "residue" after the just claims for the endowment are satisfied. This construction is warranted, I think, by the exceptional rule which obtains in favour of charities, *viz.*, that it is preferable to give effect to the general intention of the testator, though the detail be incomplete, than to declare an intestacy. The testator means to allocate all these Hudson Bay shares (income and capital) to one or other of the named charities: *In re White*, [1893] 2 Ch. 41.

The restraint upon the sale of the Isle of Wight land till a tunnel is made between the Isle and the mainland, if such should be



made within the lifetime of any of the executors or twenty-one years thereafter, would appear to be an illegal provision under *In re Rosher* (1884), 26 Ch.D. 801, followed and approved of in *Blackburn v. McCallum* (1903), 33 S.C.R. 65.

These were all the points before me, and counsel agreed that the disposal of these would sufficiently clear the way for proceeding with the administration of the estate; and I answer them as above indicated.

Costs out of the estate.

Salter M. Dickinson and others, some of the next of kin of the deceased, appealed (by leave) directly to the Court of Appeal from the judgment of BOYD, C.

November 22, 1911. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*J. A. Macintosh*, for the appellants. The learned Chancellor should have held that, if the executors were obliged to pay the debts, or any of them, secured on real or personal estate, otherwise than out of income, then to the extent that such debts are paid otherwise than out of income, the amount so paid should be restored to the estate out of accumulation of subsequent income. The devise and bequest to the Synod of the Diocese of Ottawa is made upon a condition or conditions which need not be performed within the limits allowed by the rule against perpetuities, and is therefore void: *Cherry v. Mott* (1835), 1 My. & Cr. 123; *Chamberlayne v. Brockett*, L.R. 8 Ch. 206, at p. 212; *In re Lord Stratheden and Campbell*, [1894] 3 Ch. 265; *In re Bewick*, [1911] 1 Ch. 116. If the devise and bequest to the Synod of the Diocese of Ottawa is void, the devise and bequest to the University of Bishop's College, Lennoxville, which is dependent on the validity of the devise and bequest to the Synod, is also void, and the property covered by it becomes part of the undisposed of estate: *Robinson v. Hardcastle* (1786), 2 Bro. C.C. 22; *Brudenell v. Elwes* (1801), 1 East 442; *Beard v. Westcott* (1813), 5 Taunt. 393; *Monypenny v. Dering* (1852), 2 D.M.&G. 145; *Routledge v. Dorril* (1794), 2 Ves. Jr. 356.

*Glyn Osler*, for M. Beatrice Lloyd and Rose McCaskell, next of kin, in the same interest as the appellants. The learned Chancellor's order declares that in case the executors are obliged to

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pay any portion of the secured debts before receiving sufficient income out of which to pay them, they are to pay them out of the undisposed of corpus of the estate, which is not to be replaced from subsequent income. This declaration is contrary to the express intention of the will, namely, that when the time for distribution of the corpus should arrive the corpus should be intact, the debts and charges having been discharged out of income. The testator's general intention was to postpone payment of the substantial legacies and bequests until the discharge of his debts out of income. If any creditors whose debts are due refuse to wait, the beneficiaries should not thereby become entitled to receive their legacies before the debts have been paid or provided for out of income. In case the executors are required to pay debts of an amount exceeding the income in hand, at the time payment is demanded, their duty is either to raise the necessary fund by charging upon the estate or to replace the corpus temporarily used to discharge the debts. If subsequent income cannot be used to replace moneys provided to meet a deficiency, then, the fund indicated for payment having partly failed, the devisee must take the real estate subject to the unpaid portion of the charges and incumbrances against it: Wills Act, R.S.O. 1897, ch. 128, sec. 37; *Rodhouse v. Mold* (1866), 35 L.J. Ch. 67. I adopt the argument of counsel for the appellants that the devises and bequests to the Synod and to Bishop's College are void under the rule against perpetuities under the authorities cited by him.

*Travers Lewis*, K.C., and *J. W. Bain*, K.C., for the Synod of the Diocese of Ottawa. The gift to the Synod is a vested gift, to which the rule against perpetuities cannot be applied: *Chamberlayne v. Brockett*, L.R. 8 Ch. 206, at p. 210; *In re Swain*, [1905] 1 Ch. 669. The gift being to a charity, the gift over is also good, as the rule is not applied to such a case: *Christ's Hospital v. Grainger*, 16 Sim. 83, 1 Macn. & G. 460; *Wallis v. Solicitor-General for New Zealand*, [1903] A.C. 173, at p. 186; Theobald on Wills, 7th ed., p. 367; *Re Gyde* (1898), 79 L.T.R. 261; *Attorney-General v. Bishop of Chester* (1785), 1 Bro. C.C. 444. In case the executors are obliged to pay any of the secured debts before sufficient income shall be received by them, they are entitled to pay the same out of the undisposed of corpus of the estate, and in such event the portion of the corpus so expended

is not to be replaced from subsequent income: *Metcalfe v. Hutchinson* (1875), 1 Ch.D. 591, at p. 594; Theobald on Wills, 7th ed., pp. 834 and 836; *Adamson v. Armitage* (1815), 19 Ves. 416; *Page v. Leapingwell* (1812), 18 Ves. 463; *Haig v. Swiney* (1823), 1 Sim. & Stu. 487; *In re L'Herminier*, [1894] 1 Ch. 675; *Wharton v. Masterman*, [1895] A.C. 186; *Mannox v. Greener* (1872), L.R. 14 Eq. 456, 462; *Morrow v. Jenkins* (1884), 6 O.R. 693. The restraint upon the sale of the property in the Isle of Wight and of the properties in Cornwall and the Hudson Bay shares is an illegal restraint: *Blackburn v. McCallum*, 33 S.C.R. 65. The widow is not entitled to the use of the testator's house in Cornwall if she accepts the devise to her of the testator's bungalow in the Isle of Wight and the cottage adjoining it. The Synod should be paid their costs as between solicitor and client: *Re Fleming* (1886), 11 P.R. 272, 285, and cases there cited.

*D. C. Ross*, for Bishop's College, Lennoxville. The Hudson Bay shares should be transferred to the college after payment of the debts and charges mentioned in the third paragraph of the judgment, or be held in trust by the trustees of the will and the income paid to the college until such time as the suffragan Bishop of Cornwall is appointed, and it is ascertained that his salary requires to be augmented from the income of these shares. If the devise and bequest to the Synod of the Diocese of Ottawa be held void for remoteness, the same became vested in or was transferred to the college, which is a charity *in esse*; or, there being a general charitable intention, on failure of one mode, the other indicated should take effect in favour of the College. See Taylor's Equity, pp. 176, 177; *Going v. Hanlon* (1869), 4 Ir. R.C.L. 144.

*R. Smith*, K.C., for the executors, submitted his clients' rights to the Court.

*Macintosh*, in reply. In the *Christ's Hospital* case, cited by the respondents, the first bequest was a valid one. But I deny that if the devise to the first charity is invalid, and the second offends against perpetuities, it is valid because it follows another. See *In re Bowen*, [1893] 2 Ch. 491; Theobald on Wills, 7th ed., p. 373. On the question of the validity of the gift, see *Worthing Corporation v. Heather*, [1906] 2 Ch. 532, at p. 538.

April 15. Moss, C.J.O.:—This is an appeal by certain of the next of kin of the testator, the Rev. Jacob Jehoshaphat Salter.

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Mountain, D.D., from the judgment pronounced by the Chancellor of Ontario upon two of several questions raised by the executors and executrix of the will under Con. Rule 938, as enacted by Con. Rule 1269. The questions were: whether, if the executors were obliged to pay debts or any part of debts secured on the testator's real or personal estate otherwise than out of income, the amount so paid should be restored to the estate out of subsequently accumulated income; and whether or not the devise and bequest contained in the will to the Synod of the Diocese of Ottawa is void as offending the rule against perpetuities.

The learned Chancellor determined both these questions adversely to the contention of the appellants, who are supported in the appeal by others in the same interest. Other questions were discussed by counsel for the Synod of the Diocese of Ottawa during the argument; but, if they are at all proper to be disposed of upon a proceeding of this kind, they seem not to be ripe for determination at present.

The main question is, of course, whether the devises and bequests to the Synod are void under the rule against perpetuities.

The will, which, with three codicils, deals with and purports fully to dispose of the testator's estate, is a very long and intricate instrument, containing many complicated and involved provisions and directions, due to some extent, no doubt, to the testator's evident fondness for and tendency to minute detail and his desire to leave nothing unprovided for in the final disposition of his estate. And it is apparent that he must have felt satisfied that he had effectively disposed of all he possessed, for there is no residuary clause.

His whole estate, real and personal, is said to be of the value of about \$99,000. There were debts which he appears to have divided into two classes, and which it was his desire should be treated differently or at least regarded in a different way by his executors in the administration of his estate: (a) ordinary current debts, which he calls his "just debts;" and (b) debts secured by him on lands or personalty, among which he seems to have included a liability of \$5,000 to the University at Windsor, Nova Scotia, for which, he says, he gave his "note of hand."

He desired the first class, together with his funeral expenses, to be paid as soon after his death as possible. His intention with



regard to the other class was to postpone payment so far as to enable them to be paid off from the income of his estate. He could not, of course, control the action of the creditors, in case they were not willing to wait after their claims became payable. Beyond this, he gives no specific directions to his executors with regard to the payment of these debts, except what is to be gathered by inference from the 19th paragraph of the will, and the direction in the first codicil as to the payment by the executors of the \$5,000 to the Alumni Association of King's College, instead of directly to the University of Windsor. This latter direction is quite consistent with the payment of the amount in one sum out of the general estate, instead of out of income. By the 11th paragraph of the will, the testator gives directions for the conveyance of the properties there mentioned, and the proceeds of any that may have been sold, to the Synod of the Diocese of Ottawa, to be held by it in trust for the endowment of the bishopric of Cornwall, only delayed, if at all, by virtue of what is provided in the 19th paragraph of the will. But I do not think that these provisions were intended to affect or do affect the vesting in the Synod of Ottawa of an immediate estate or interest for the purposes designated in the 11th paragraph. The two paragraphs must be read together, and, so read, they are found to contain, as the learned Chancellor expresses it, "an immediate gift for charitable uses, delayed as to the actual conveyance till the secured debts are paid, and, therefore, vested at his (the testator's) death."

Here the gift to the Synod for the charitable purposes expressed is not conditional upon the payment of the debts out of the income. The gift takes immediate effect, whichever way the debts may be paid. In the recent case of *In re Bewick*, [1911] 1 Ch. 116, much relied upon by the appellants, there was no gift to the children living and the issue of any that might have died nor any vesting in them of any beneficial interest until all the testator's real estate should be clear of all charges thereon—a wholly uncertain event which might operate to postpone the period of vesting beyond that prescribed by the rule against perpetuities. I agree with the construction which the learned Chancellor has placed upon this will as regards this branch of the case.

As to the application of income to the exoneration of the general estate, to the extent, if any, to which it may be called upon

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to answer the secured debts, I am, with deference, unable to perceive any reason why that should not be the case. It is very apparent that, while the testator was anxious, if possible, to free the incumbered estates by the application of income, he had no intention that they should be freed at the expense of the general estate; and I think the judgment should be varied in this respect.

We were asked by counsel for the Synod to pronounce upon a number of other points. One was with regard to a further declaration as to conditions which he submitted were in restraint of sale of the testator's Cornwall property and Hudson Bay shares. This may or may not depend upon circumstances, and could properly arise only in administration proceedings. So with regard to the alleged obligation of the testator's widow to elect between the gifts to her of a life estate in the testator's Cornwall house and one in the Isle of Wight. The facts are not sufficiently developed to enable any proper conclusion to be arrived at on this question. Then, as to the claim that the Synod should be paid its costs as between solicitor and client, the rule does not extend in general beyond the applying trustee or executor, and we could not interfere with the order as it now stands in this respect.

Except as indicated, I would affirm the judgment appealed from, the directions of which appear quite sufficient to enable all the matters dealt with by the learned Chancellor to be properly worked out.

As to costs, the appellants have failed as to the substantial part of their appeal, and should pay the costs of the respondents who are adverse in interest to them. The executors' costs, as between solicitor and client, may be paid out of the estate.

MEREDITH, J.A.:—This matter seems to me to be within quite a narrow compass; and easy to be determined if approached in the right way.

Our duty is not to endeavour to wreck this will upon the shoals of technicality, or upon any rock of inexorable rule of law, but rather to guide it through such obstacles, and to give effect to the testator's intentions, expressed in it, if, by any lawful means, that can be done, and, for that purpose, to take a comprehensive view of the will, not to search for, and stumble at, minute seeming contradictions or uncertainties; and that duty can, I think, be accomplished without any sort of serious difficulty.

I am unable to perceive any substantial reason why the gift to the Synod may not be considered a vested gift, to which the rule against perpetuities cannot be applied; and once vested the estate may last indefinitely without offending the rule; and, the gift being a gift to a charity, and the gift over to another charity, the gift over is also good, as the rule is not applied to such a case: see *In re Tyler*, [1891] 3 Ch. 252. In this respect this matter comes within the authority of *Chamberlayne v. Brockett*, L.R. 8 Ch. 206, and not within that of *In re Lord Stratheden and Campbell*, [1894] 3 Ch. 265, in which the gift was made upon a condition that might never happen; in this case the gift was vested, but to be divested in a certain event. The intention was not to give only in the event of the creation of the new see; that would be to frustrate, rather than to further, the testator's object, an object which was dear to his heart. He knew that that could hardly be accomplished without the means which he was providing, and possibly might not be, even with them; and so the means were given presently, but to be withdrawn if the bishopric were not an accomplished fact within the twenty-five years. The parenthetical restriction, contained in the 12th item of the will, may, I think, be considered an attempt to restrain alienation; whether valid or not is immaterial upon this the main question in the case.

The provision for the payment of debts out of the income does not aid the appellants in this respect, nor would it, if it delayed the beneficiaries having the benefit of the gifts to them, beyond the perpetuities' period; for a trustee in such a case holds in trust for the beneficiary, subject to the payment of the debts: *Bacon v. Proctor* (1822), T. & R. 31.

If creditors will not wait, or if the beneficiaries are willing to pay off all charges against their properties, I cannot understand why the simple method adopted in the case of *Bacon v. Proctor* should not be followed; or, in any case, why the money to pay off pressing creditors may not be raised upon the estate in such a manner as will put the new creditors in precisely the same position as the old creditors, and so leave this matter, substantially, precisely as the testator left it by his will: and, I think, this should be done. But, whatever course may be adopted, the burden

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ought to be made to fall, in all respects, just as it would under the will, if possible, and, if not possible in all respects, then as nearly so as possible.

Questions of restraint on alienation do not seem to me to be proper subjects of an application such as this. An expression of opinion upon such an application would be of no useful binding effect; upon proceedings between vendor and purchaser such a question would properly arise and a judicial opinion be effectual. An opinion now expressed would be especially out of place, in my opinion, in regard to the land in the Isle of Wight: I, therefore, refrain from expressing any opinion upon these questions.

The question whether the widow is entitled to Pinehurst House, as well as to the Bungalow, depends entirely upon the question of fact, whether, at the time of the testator's death, Pinehurst House was his and was also the home of his wife and himself. Each gift is for life; there is no restriction upon that of the Bungalow, but in regard to Pinehurst House his will is: "She is also to have the use, rent free, during the time of her natural life, of this 'Pinehurst House,' furnished, or of whichever house of mine may be our home at time of my decease." So that, though the widow certainly takes the Bungalow, she loses Pinehurst House if at the time of the testator's death the Bungalow were "our home," for it was unquestionably a "house of mine." In the codicil of the 29th May, 1909, the last codicil, the testator refers to his property in the Isle of Wight as his "temporary residence."

There is no sufficient ground upon which the disposition of the costs of the application can be disturbed; but the appellants ought to pay the general costs of this appeal, the substantial question being the validity of the gifts to the charities.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

*Judgment below varied.*



## [IN THE COURT OF APPEAL.]

## MERCHANTS BANK OF CANADA V. THOMPSON.

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*Promissory Note—Indorsement to Bank by Customer before Maturity—Purpose of—Collection or Collateral Security—Lien of Bank for Amount Owed by Customer—Fresh Indebtedness when Note Overdue—Failure of Consideration between Original Parties—Purchase of Share in Partnership—Part Failure of Consideration.*

The judgment of a Divisional Court, 23 O.L.R. 502, was reversed and the judgment of BOYD, C. restored; MACLAREN, J.A., dissenting.

*Per Moss, C.J.O.*:—Even if the promissory note sued on was indorsed to the plaintiffs merely for collection, and not as collateral security, the plaintiffs were still entitled to the judgment awarded to them by BOYD, C. As indorsees for collection, they were entitled to a lien on the note for debts that were then presently payable and from time to time thereafter becoming payable. When the note was received by the plaintiffs, it was a note for good consideration, not overdue. The defendants became parties to the note as sureties for L. upon a transaction between him and F. for the acquisition by L. of a half share in the business of F. and the formation of a partnership between them. The partnership was in fact created; and its subsequent termination would not bring about a total failure of consideration so as to affect the validity of the note in the hands of either F. or the plaintiffs. Upon taking the partnership accounts, L. might be able to shew himself entitled to a return of part of the premium; but it was for the defendants to shew this, if they wished to avail themselves of the defence of part failure of consideration; and they had not shewn it.

*Per MEREDITH, J.A.*:—The proper conclusion upon the facts is, that the note was taken and always held by the plaintiffs as security for the repayment of all that might from time to time be owing by F. to the plaintiffs. And, that being so, the note was good, in the plaintiffs' hands, against the makers of it, for the amount of the indebtedness of F. to the plaintiffs; the fact that at some times there was nothing due from F. to the plaintiffs would not cut out that right or deprive the plaintiffs of the position of a holder in due course; there would not be by implication a new transfer of the note as security for each separate indebtedness or advance; there would be but the one transaction, to which all changes in the account between F. and the plaintiffs would be referable; everything would relate back to the one transfer made while the note was current; although it was competent for F. to take up the note at any time when there was no obligation on his part to the plaintiffs.

*Atwood v. Crowdie* (1816), 1 Stark. 483, followed.

*Per MACLAREN, J.A.*:—The note was left with the plaintiffs "for what it was worth," without any special pledging or hypothecation; and the right which the plaintiffs had under their banker's lien was the right to retain the note for any debt due to them; they had no right to retain it for any liability not yet due or payable. The legal position of the plaintiffs was the same as though they had returned the note to F. when there was nothing owing by him, and he had redelivered it to them when he again became indebted to them, it being then overdue, and so taken subject to all the equities between the makers and F.; and there was such a failure of consideration as between F. and L. as would prevent the plaintiffs from recovering.

*Atwood v. Crowdie*, *supra*, explained.

AN appeal by the plaintiffs from the judgment of a Divisional Court, 23 O.L.R. 502.

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January 16 and 17. The appeal was heard by Moss, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

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*J. F. Orde*, K.C., for the plaintiffs. There was not a total failure of consideration. Living got what he agreed to pay for: Lindley on Partnership, 7th ed., p. 626. The failure of consideration (if any) was at most but partial, entitling Living to a partial return of his premium: Chalmers on Bills of Exchange, 7th ed., p. 108; *Kilroy v. Simkins* (1876), 26 C.P. 281. The note was, prior to its maturity, pledged to the bank as collateral security for advances theretofore made and thereafter to be made to Fox. Consequently, notwithstanding that the loans to Fox were from time to time paid off, the plaintiffs' right to the security would attach from the date of the pledge, September, 1907; *Atwood v. Crowdie* (1816), 1 Stark. 483. But the plaintiffs' right to recover does not depend upon an express pledging of the note. The plaintiffs, in any event, held the note for collection, and were consequently entitled to exercise their banker's lien, which has the effect of creating a pledge without any conscious pledging: Paget on Banking, 2nd ed., pp. 297, 298; Grant on Banking, 6th ed., pp. 301 and 305; Hart on Banking, 2nd ed., p. 744; *Brandao v. Barnett* (1846), 12 Cl. & F. 787; and by virtue of their lien they became holders for value and are entitled to recover to the extent of the lien: Bills of Exchange Act, sec. 54; Maclaren on Bills, 4th ed., pp. 174, 175; Falconbridge on Banking, pp. 449 *et seq.*; Chalmers on Bills of Exchange, 7th ed., pp. 93 *et seq.* No state of facts has been shewn by the defendants which constituted an "equity attaching to the note" or rendered Fox's title defective within the meaning of sec. 70 of the Bills of Exchange Act: *Oulds v. Harrison* (1854), 10 Ex. 572; *In re Overend Gurney & Co., Ex p. Swan* (1868), L.R. 6 Eq. 344. The cases of *Holmes v. Kidd* (1858), 3 H. & N. 891, and *Ching v. Jeffery* (1885), 12 A.R. 432, are clearly distinguishable from the present case. What took place in both these cases amounted in effect to payment or part payment, and the amount was in each case liquidated and ascertained. The appellants also rely upon the reasons given by the Chancellor and Mr. Justice Britton.

*Travers Lewis*, K.C., and *J. W. Bain*, K.C., for the defendants. The note represented the purchase-price of a half share

in Fox's manufacturing agencies, which half share Living never got; and, consequently, the consideration for the note wholly failed. Section 54 of the Bills of Exchange Act, relied upon by the learned trial Judge, we submit, does not extend to the case of a dishonoured note: *Hart on Banking*, 2nd ed., p. 480; *Giles v. Perkins* (1807), 9 East 12; *Thompson v. Giles* (1824), 2 B. & C. 422; *Dawson v. Isle*, [1906] 1 Ch. 633, 637. The evidence shews that the note was deposited for collection only. There is no doubt that the defendants were sureties; and the bank manager, after the note matured, must have known that such was the case. The note was repledged after maturity, and the bank had no property in it, but only a lien at most, under sec. 54 of the Bills of Exchange Act. As soon as the indebtedness of Fox was wiped out, the lien was discharged; and, when a new lien accrued, it would be subject to the intervening equities: *Chalmers on Bills of Exchange*, 6th ed., p. 120. Sections 54 and 70 of the Bills of Exchange Act ought not to be read together: *Falconbridge on Banking and Bills of Exchange*, pp. 477, 478; *Ching v. Jeffery*, 12 A.R. 432, especially at pp. 434, 436; *Polak v. Everett* (1876), 1 Q.B.D. 669, *per* Blackburn, J., at p. 674; *Britton v. Fisher* (1867), 26 U.C.R. 338, at pp. 339, 340. The evidence shews that there was a binding agreement by Fox to give time to Living; and the learned trial Judge erred, we submit, in thinking that there was no sufficient variation to alter the position of the parties: *Canada Permanent Loan and Savings Co. v. Ball* (1899), 30 O.R. 557, and particularly at pp. 568, 572, 573, and the authorities there collected; *Bonar v. Macdonald* (1850), 3 H.L.C. 226, 238. Making an agreement with the principal debtor for 8 per cent. interest on the overdue note is a giving of time sufficient to discharge the sureties: *Blake v. White* (1835), 1 Y. & C. (Ex.) 420, 426; *DeColyar on Guarantees*, 3rd ed., pp. 422, 424; *Brandt on Suretyship* (1905), vol. 1, secs. 389, 394; *Lime Rock Bank v. Mallett* (1856), 42 Me. 349, 358; *Rowlatt on Suretyship* (1899), p. 245. On the point of banker's lien, see *Lloyd v. Davis* (1824), 3 L.J.O.S.K.B. 38; *Falconbridge on Banking*, p. 460, and cases there cited. The respondents also rely on the reasons given by the Chief Justice of the King's Bench.

*Orde*, in reply.

April 15. Moss, C.J.O.:—This is an appeal by the plaintiffs

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from a judgment of a Divisional Court reversing (Britton, J., dissenting) a judgment of the Chancellor of Ontario at the trial without a jury.

The case is reported in 23 O.L.R. 502, where the facts are fully stated in the judgment of the Chief Justice of the King's Bench.

The plaintiffs sue as the holders of a promissory note for \$2,000 made by one A. H. Living and the defendants in favour of one C. H. Fox, and by him indorsed to the plaintiffs' order. The note is in form joint and several. The action was brought against the two defendants alone, and no steps were taken by them to bring or cause the plaintiffs to bring Living and Fox into the action.

They were, of course, not bound to do so unless they considered it material to their defence; but, in one aspect of the case, it might have been to their advantage to have had them before the Court.

The defences relied upon, as shewn by the record upon which the parties went to trial, as well as those afterwards permitted to be set up, are set forth on p. 508 of the report.

As regards the answers to the action alleged in the first paragraph of the original defence and repeated in substance in two paragraphs of the further defences, viz., an agreement for extension of time and neglect to give notice of dishonour to the defendants, there is no difference of opinion between the trial Judge and the Divisional Court. These defences failed for lack of proof that the plaintiffs had notice that the defendants were sureties for Living.

The other defences, viz., that the note was made without consideration and was indorsed to the plaintiffs without consideration and after maturity; that the consideration for the note as between Fox and Living failed, and that at the time of the commencement of the action the plaintiffs' title was no higher than Fox's, and the note was held subject to the existing equities between him and Living, are those upon which the differences of opinion have arisen. It is now beyond question, upon the evidence, that the defendants became parties to the note as sureties for Living upon a transaction between him and Fox for the acquisition by the former of a half share or interest in



the business of manufacturers' agent carried on by Fox in the city of Vancouver, and the formation of a partnership between them in the business. The nature of the transaction is to be gathered from the evidence of these parties and the memorandum of agreement signed by them. In effect, it was the not unusual transaction of a person purchasing his way into an established business, paying a bonus or premium to the owner, and entering into partnership with him, upon terms arranged between them.

The bonus or premium to be paid was \$2,000; but, as Living was unable to provide the money, and Fox was willing to accept the promissory note of the defendants, Living prevailed upon them to join him in the note in question. It is dated the 1st July, 1907, payable three months after date, and therefore fell due and payable on the 4th October, 1907. It was received by the plaintiffs from Fox on the 12th September, 1907, and has been in their possession ever since.

At the time when the note was received, the plaintiffs had under discount a note for \$500 made by Fox dated the 4th September, payable in thirty days, but beyond this he was not indebted to the plaintiffs.

There is upon the testimony a far from satisfactory account of the terms or conditions under which the note was left with the plaintiffs. Fox was positive that it was left for collateral and collection. The plaintiffs' manager would not use the term "collateral." He said it was left "for what it was worth," and the records shew that it was entered in the collection and not in the collateral register. The learned Chancellor found as a fact that it was left as collateral security and also for collection; while, in the Divisional Court, the learned Chief Justice said that, notwithstanding Fox's evidence, the impression made upon him was that the note was indorsed to the plaintiffs merely for collection, and not as collateral. The conclusion I have reached upon the question of consideration renders it unnecessary finally to decide between these conflicting views; but, on the whole, I incline to the latter. Even so, in my view, it still leaves the plaintiffs entitled to the judgment awarded to them by the Chancellor.

As indorsees for collection of the note, they were entitled to a lien on it for debts that were then presently payable and from

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time to time thereafter becoming payable. The claim now made is in respect of an indebtedness of Fox which became payable from and after the 24th November, 1908. Prior to that date, there was a period in which Fox was free from direct indebtedness, although there were some outstanding notes or drafts under discount; a time during which, according to the plaintiffs' manager, Fox was at liberty to take the note out of the plaintiffs' possession had he chosen. But Fox did not take it away, and it remained with the plaintiffs until the debts now due and payable had accrued. And, unless something had occurred between Fox and Living prior to the 24th November which furnished the latter with a defence to an action on the note, the plaintiffs are entitled as holders to a lien for the amount of Fox's indebtedness to them.

The defence set up is want of consideration and total failure of consideration. Upon the evidence, it seems to me to be plain that there was good consideration for the note when it was given. Living obtained an interest in Fox's agency business which he then had and which he might thereafter acquire, and became a partner on equal terms with Fox. He was and acted as a partner for at least fifteen months, during which time he says he earned or become entitled to several thousand dollars as profits, and actually received about \$1,000 for his own use. He was known to at least some of the customers or persons with whom or on whose behalf he and Fox executed commissions, and drafts in the firm name had been drawn upon some of them. Upon the facts, it would be impossible for Fox to deny that Living was a co-partner or legally to refuse him his rights as such. Neither could Living be heard to say, as against persons dealing with the firm, that he was not a partner. When, therefore, the note was received by the plaintiffs, it was a note for good consideration, not overdue.

But then it is said that a failure of consideration accrued by reason of what took place between Fox and Living in July, 1908, when Living left the firm's place of business. What occurred at that time could have no greater effect than a dissolution of the partnership. If, as Living seems to think, it was a wrongful expulsion, that could not alter his right to be restored, or, if the

conditions appeared to be such as to render impossible a continuance of the partnership, to a judgment for dissolution, upon such terms as the circumstances justified. Whether Living considered that a dissolution was effected by what occurred, or considered that he was wrongfully expelled, he seems to have acquiesced, and to have taken no steps either to be restored or to procure a taking of the partnership accounts.

The circumstance that Living paid or was paying a premium or bonus could make no difference in this case, where there was no stipulation or agreement as to the time of the duration of the partnership.

Whether through oversight or inadvertence, there was no agreement that the partnership should continue for a specified time or definite period. But the partnership was in fact created; and, that being so, its subsequent termination would not create a total failure of consideration so as to affect the validity of the note in the hands of either Fox or the plaintiffs; although, upon taking the partnership accounts, Living might be able to shew himself entitled to a return of part of the premium. The question is discussed at length in Lindley on Partnership, 7th ed., p. 625 *et seq.* At p. 626 it is said: "In the first place, assuming the partnership to have been in fact created, it is clear that there has not been a *total* failure of consideration for the premium; and, consequently, it cannot be recovered as money paid for a consideration which has failed. In the next place, persons who enter into partnership know that it may be determined at any time by death and other events; and unless they provide against such contingencies, they may fairly be considered as content to take the chance of their happening, and the tendency of modern decisions is to act on this principle." It does not necessarily follow that no part of the premium is to be returned in any case. On the contrary, it appears from many authorities that in cases where the dissolution was not brought about by wrongful conduct on the part of the partner who paid the premium, or under circumstances for which he is responsible, a return of part may be awarded. But as to what part, the learned author says (p. 630): "There is no definite rule for deciding in any particular case the amount which ought to be returned;" and instances

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are given of the circumstances which are to be taken into consideration.

The defendants' difficulty in this case is, that they have not shewn the circumstances attending the dissolution sufficiently to enable a decision to be given as to whether Living is entitled to a return of part of the premium. There are charges and counter-charges of misconduct on the part of Fox and Living; but they are not before the Court; and it was for the defendants, if they desired to avail themselves of the defence of partial failure, to have put the case in proper train for inquiry. Neither is there material upon which can be ascertained what, if any, proportion of the premium should be returned—nothing to reduce the amount of the indebtedness as represented by the note. The burden of shewing this was on the defendants, and it was not for the plaintiffs to shew the state of the accounts. Payments, either by reduction of the amount of the premium or receipt by Fox of profits of the business, were to be proved by the defendants, and they failed to shew either.

The appeal should be allowed and the judgment at the trial restored with costs of the appeal to the Divisional Court and this Court.

MEREDITH, J.A.:—The first question involved in this case is one of fact, namely: What was the nature and effect of the transaction between the bank and Fox by which the bank became the holders of the promissory note in question, of which he was the payee, by virtue of the indorsement of it by him over to their order, and the delivery of it at the same time, by him to them.

We are, of course, not bound by the present impressions, of either of the parties to that transfer, as to its true nature and effect; memory, at best, is likely to be more or less treacherous, and none the less because one of the persons was the manager of a bank, upon whose mind impressions of banking transactions were being continuously made in large numbers. In such a case as this, the surrounding circumstances and the probabilities are very useful witnesses.

Fox was a customer of the bank, and a man whose business affairs, or other exigencies, made it necessary<sup>9</sup> or expedient for him to borrow money from time to time, and the note in ques-



tion was, at least, likely to be helpful and to be used in obtaining the necessary credit in such an institution as this bank—one of the several foremost in this country.

There are really only three purposes for which it is possible that the transfer of the note could have taken place: (1) for safe-keeping; (2) as security for money advanced or to be advanced; or (3) for collection.

Safe-keeping—mere custody—is out of the question: no one suggests it; it ought not to have been indorsed over if that were the intention of the parties.

Collection alone seems to me to be also out of the question; no one testifies to it; and no one, having regard to all the circumstances of the case, could reasonably conclude that such was the full nature and effect of the transaction. It was the note of the man's partner, transferred while they were carrying on business together, many months before the rupture between them: it was not a note of the ordinary mercantile character usually paid and taken up through the payee's banker. What reason can be suggested for placing the promissory note of one's partner in a bank for collection: this partner was the principal debtor, and he was at hand: if it be suggested that the payee knew or expected that the partner would resist payment, then it is almost certain that it would be transferred so as to give the bank higher rights than the payee's.

The testimony of the bank's manager is that the note was taken by the bank, through him, for what it was worth; that is, of course, for what it was worth in Fox's dealings with the bank and his obligations to the bank in connection with them, not for the small commission to be had for collection if it were paid at maturity. The testimony of Fox at the trial was that the purpose of the transaction was that the bank should hold the note as collateral security for moneys advanced to him from time to time; and, he added, "from drafts going through;" words which do not seem to me to have been intended to put any express limitation upon the extent of the security, but rather to indicate that which was in the mind of the witness at the moment of making the statement; and was his way of expressing the character of the business which he did with the bank and for which they would need security; strictly speaking, they must have meant more

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than they literally convey. No security would be needed for drafts going through for collection; security would be needed only for money advanced, whether on "paper" strictly called drafts or not.

It is quite obvious that, if the manager had regard for his masters' interests, or for his own reputation as a banker, he would have taken the note as security for such sum as might from time to time be advanced by the bank to Fox, especially as there can be no manner of doubt that Fox was quite willing that the bank should so acquire and hold it; that is, that it should be held as security for the amount of Fox's indebtedness to the bank from time to time in his account with them. If we draw the conclusion, from circumstances fully warranting it, that the banker would take all the security he could get, and would try to get more, we shall be very much nearer the truth in almost, if not quite, every case, than if, from the same circumstances, we conclude that he would reject security which he might as easily have had and would reject it without rhyme or reason.

So that we have a customer, hungry for credit on the best terms obtainable, with a negotiable instrument by which he can get more credit and better terms if he pledge it as a standing security; and a banker always hungry of every available security; and so you might as well expect two hungry men to put aside, instead of eating, good food set before them to be eaten, as to expect this note under the circumstances to be laid aside for collection only: I accept Fox's statement as to the purpose of the transfer of it without any sort of doubt.

There is really nothing, that militates against this view of this case, in any of the circumstances relied upon by the respondents: it was quite right in any case to enter the note in the bank's collection docket: why not? It was in the bank's interests, and no doubt their duty, to send it through the regular process for collection. It was not discounted: the proper course of the bank seems to me to have been taken in taking the usual steps to enable the makers to pay at maturity: and would have been taken in placing the proceeds of the note to the credit of Fox's account, if it had been paid.

If for collection only, it would be odd that, for many weeks after it became payable, no steps of any kind were taken respecting it: remaining as it did is, of course, that which was entirely

right if it were a subsisting security. And, beside all this, as I have before mentioned, if there were any likelihood of the defences which are now being set up, it would have been better for Fox that the bank should become and remain throughout holders for value, unaffected by any equity in respect of it, to the extent of his indebtedness to it.

The fact that no "hypothecation paper" was taken with it has little, if any, weight. It was a single note, and the course of business of the bank in that respect, at the branch where the transaction took place, is testified by the manager to have been as follows, in this respect:—

"Q. And you took a hypothecation, I suppose, at the time?  
A. No.

"Q. Isn't that usual when notes are left at a bank, except when they are left for mere safe-keeping? A. It is more regular. Sometimes one way and sometimes the other."

And I cannot think that the testimony of the bank manager warrants any such conclusion as that Fox might have taken up this note at any time when he was under any liability to the bank: he could, of course, have taken it up at any time when no such obligation existed; but, of course, at the risk of not getting credit when he next sought it.

If Fox were making, and if in law he could make, an appropriation of the proceeds of the note to the payment of the balance of his account by the bank, on the ground that the bank never acquired or held the note in this way, would he be likely to succeed? We must not let sympathy for the man who made the note, and got others to join with him as makers, and who plainly has not come very well out of his co-partnership experience with Fox, affect the strict legal rights of the parties. If it may be said, to the bank, why did you not take a writing evidencing the fact, if it were a fact, that you were to hold the note as your continuing security? might it not, with much greater force, be said to Fox, why did you not take a receipt for the note shewing that it was transferred for collection only? and why not take the note up, or do something in regard to it, after failure of the makers to pay?

The disinclination of the bank to have the note sued on in their name does not help the respondents; if they were collectors

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merely in the sense of a collecting agency, they would be less likely to have such a disinclination. Such a disinclination is natural in any case, and the more so at the instance of another and for his benefit; but, in this case, the bank have been driven to sue in their own interests now.

My conclusion upon the first question involved is, that the note was taken and always held by the bank as security for the repayment of all that might from time to time be owing by Fox to the bank: see *Atwood v. Crowdie*, 1 Stark. 483.

If I am right as to the facts, there can be no doubt that the note is good, in the bank's hands, against the makers of it, for the amount of the indebtedness of Fox to the bank, for which judgment was entered in favour of the bank at the trial: the fact that at some times there was nothing due from Fox to the bank would not cut out that right or deprive the bank of the position of a holder in due course; there would not be by implication a new transfer of the note as security for each separate indebtedness or advance; there would be but the one transaction, to which all changes in the account between Fox and the bank would be referable; everything would relate back to the one transfer, made while the note was current; although, of course, it was quite competent for Fox to have taken up the note at any time when there was no obligation on his part to the bank: see *Atwood v. Crowdie*, 1 Stark. 483—a case extremely like this case in substance.

I would allow the appeal and restore the judgment to the extent of the amount of the plaintiffs' claim proved at the trial.

GARROW and MAGEE, JJ.A., agreed in allowing the appeal.

MACLAREN, J.A. (dissenting):—This action was brought by the bank against two of the three makers of a joint and several promissory note for \$2,000 to the order of one C. H. Fox, who indorsed it over to the bank before maturity. It was not protested, and has not been paid. The action was tried by Boyd, C., who held that, under sec. 54, sub-sec. 2, of the Bills of Exchange Act, the bank was entitled to recover against the makers the sum of \$1,116.39, being the amount of their lien for the indebtedness of Fox. The defendants having appealed to the Divisional Court, the judgment was reversed and the action



dismissed, on the ground that the bank was not a holder in due course, but acquired its lien after maturity and dishonour and after a total failure of consideration. Britton, J., dissented.

The note in question was given under the following agreement:—

“I agree to buy one-half interest in the manufacturers’ agency of Mr. Chas. Fox, in the city of Vancouver; to have one-half interest in all agencies controlled by him and any agencies which he shall secure: Mr. Fox to have one-half interest in all agencies which I shall secure—for the sum of two thousand dollars (\$2,000).

“That Mr. Fox and myself to each put into the business the sum of one thousand dollars (\$1,000).

“That I shall work my way to Montreal, returning to Vancouver as soon as possible.

“Mr. Fox and myself to each draw a stated salary agreeable to each other.

“Balance of commissions, after salary and general expense accounts are deducted, to be equally divided.

“Dated at Vancouver, in the Province of British Columbia, this 19th day of March, 1907. C. H. Fox. Alf. H. Living.”

On the same day, Fox gave Living the following letter: “Vancouver, Canada, March 19th, 1907. Mr. A. Living. Dear Sir: Confirming our agreement of to-day, it was understood that I will at my own expense take a trip to England and Germany during the next year to secure better agencies, particularly cutlery, household furnishings, and fire-arms. Yours truly, C. H. Fox.”

Living had not the \$2,000 to pay Fox; but, after getting a note that was not satisfactory and was returned, he finally persuaded the two defendants, his uncle Thompson, and his mother-in-law Mrs. Turley, both of Ottawa, to join him in a joint and several note dated Vancouver, July 1st, 1907, for \$2,000, payable in three months after date, to the order of Fox.

Early in August, Fox tried to discount this note at the Merchants Bank, Vancouver; but, after inquiry, the manager, Harrison, declined to discount it. Fox took it away, but on the 12th September, 1907, he brought it back and left it with the manager. There is a question as to the terms on which it was left, which will be considered presently.

The defendants urged in the Courts below and before us

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that Fox, when he was the legal holder of the note after maturity, had given time to Living, who was his only debtor, the defendants being merely sureties, and that on this account the defendants were released. It was held by both Courts that this defence was not proved; and I am of opinion that they were clearly right.

It was also argued before us that, as the defendants were mere accommodation makers, the bank could not, after maturity and dishonour, acquire a good title to the note as against the sureties, and that they were released by not being notified of the dishonour. Being makers, they were not entitled to notice, and the mere fact of their being accommodation makers was not alone sufficient to prevent the bank acquiring a good title after maturity for value, as this is not an equity attaching to a note. See Chalmers on Bills of Exchange, 7th ed., p. 130; 1 Daniel on Negotiable Instruments, sec. 726; *Sturtevant v. Ford* (1842), 4 M. & G. 101.

When we come to deal with the main question, we find the situation a very unsatisfactory one, as the business between Fox and Living was done in the most slipshod and irregular manner, as were also the dealings between Fox and the bank with respect to the note in question. Neither Fox nor Living was made a defendant in the present action; but they were both witnesses at the trial; and, wherein they differ in their testimony, the Chancellor does not express any preference. Harrison, the manager of the bank, who personally made the arrangements with Fox regarding the note, was not at the trial, he having been previously examined at Vancouver under a commission; so that, as regards his testimony, we are in the same position as was the Chancellor. Where his testimony conflicts with that of Fox, I prefer to accept his version of the facts especially as he is corroborated by the books and by the entries and records made at the time. As to the terms on which Fox left the note with him, Harrison simply says, "He left it with me for what it was worth."

From the evidence of Harrison it appears that on the 4th September, 1907, he had discounted for Fox a \$500 note, which was current on the 12th September, when the note now sued on was left with him at the bank. He also discounted another

note for \$300 for Fox on the 29th September, 1907. From this time onward until the 25th November, 1908, Fox was from time to time indebted to the bank in varying amounts; and at times, sometimes for weeks at a time, he was free from such indebtedness. From the 25th November, 1908, until this action was brought on the 2nd March, 1909, he was indebted continuously. Harrison's evidence as to the position of the note during these periods is given as follows: "Q. And at any time during this period, when Fox was indebted to the bank, he could have taken the note out of your possession and done whatever he chose with it? A. Yes, had he chosen." As a banker, he knew that this correctly described the position of the bank with respect to a note left with it by a customer, as he says this one was, simply "for what it was worth," and without any special pledging or hypothecation, and the rights which the bank had under the banker's lien, whereby it has the right to retain any such note for any debt due to it; but has not the right to retain it for any liability which has not yet become due or payable. See Grant on Banking, 2nd ed., p. 306; 1 Halsbury's Laws of England, sec. 1258.

It was urged on behalf of the bank, on the authority of *Atwood v. Crowdie*, 1 Stark. 483, that, although there was no lien when there was nothing due, yet, on the \$450 note becoming due on the 25th November, 1908, the lien of the bank would revive as of the 12th September, 1907, the date of the original delivery of the note to the bank.

Such is not the effect of *Atwood v. Crowdie*. Lord Ellenborough's holding was not what is claimed, but was that the lien on the accommodation bills having ceased to attach when the debt was paid "by allowing them to remain in the hands of the plaintiffs, the lien revested, when upon fresh advances made, the balance turned in favour of the plaintiffs." What the case really decided was that the lien would revive as of the date of the fresh advances, and that a party might acquire a lien on accommodation bills after their maturity. This case, so far as it is in point, is entirely in favour of the defendants, as it would shew that the bank is in the position of any other holder taking a bill after maturity—it takes it subject to its equities. The legal position of the bank in this case is the same as though

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it had returned the note to Fox when there was nothing owing by him, and he had redelivered it to the bank when he again became indebted to the bank on the 25th November.

The next question is, whether there was such a failure of consideration as between Fox and Living as would prevent the bank from recovering, as was held by the Divisional Court. In order to decide as to this, we have to look at their agreement of the 19th March, 1907, set out above, and to consider their relations and the dealings between them, in so far as they may affect this note up to the 25th November, 1908.

A glance at the agreement will shew how crudely and inartificially it is drawn; and a perusal of the agreement and the evidence will shew how completely each of the parties appears to have failed, in almost every particular, to carry out the terms and stipulations binding upon them respectively.

The evidence shews that Fox never made over or gave to Living the one-half or any other interest in any of the agencies he then had or secured afterwards, and that Living never gave him the \$2,000 or any part of it; that neither of them paid in any part of the \$1,000 which they were each to contribute as capital; that Fox kept sole control of the business premises, his own name alone appearing on the sign; that no partnership books were ever opened or kept; that the bank account remained in the name of Fox individually; and that he did not go to England or Germany, as he undertook to do, in order to secure better agencies. The nearest approach to anything like a partnership appears to have been their getting a few months after the agreement some stationery with the name of "Fox & Living" upon it. Fox says this was used for some of their correspondence, which Living denies. Their proposed partnership amounted to so little that, when they quarrelled and Fox put Living out, all the latter had to do was to pick up a few private letters off the desk and walk out. Up to the time of the trial (nearly two years) neither of them had taken any further steps to settle up their business. The only question, however, with which we have to deal at present is that of the consideration or the failure of consideration for the note. This was the \$2,000 which Living was, under the first paragraph of the agreement, to pay Fox for a one-half interest in all the agencies then controlled by Fox,



and in any he might thereafter secure, possibly including his undertaking to go to England and Germany at his own expense, no part of which was carried out by Fox, so that there was a total failure of consideration. This being a defect of title within the meaning of sec. 70 of the Bills of Exchange Act, or equity attaching to the note, and existing before and at the time that the lien upon which the bank sued had its origin, which was long after the maturity of the note, the bank could acquire no better title than Fox then had; and the note was void for want of consideration.

If the parties were going into matters beyond this, it could only be done, as the learned Chancellor suggested, in proceedings to which Fox and Living were parties.

For these reasons and others given by Falconbridge, C.J., I am of opinion that the judgment of the Divisional Court was right, and should be affirmed.

*Appeal allowed; MACLAREN, J.A., dissenting.*

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[IN THE COURT OF APPEAL.]

COUNTY OF WENTWORTH v. TOWNSHIP OF WEST FLAM-  
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*Highway—Township Boundary Line—"Deviation"—Substitution—Municipal Act, 1903, sec. 622.*

April 15

*Held*, affirming the judgment of a Divisional Court, 23 O.L.R. 583, that the road in question was and is a "deviation" of a town-line road, within the meaning of sec. 622 of the Municipal Act, 1903.

*Township of Fitzroy v. County of Carleton* (1905), 9 O.L.R. 686, specially referred to.

APPEAL by the defendants from the judgment of a Divisional Court, 23 O.L.R. 583.

November 27, 1911. The appeal was heard by Moss, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

G. Lynch-Staunton, K.C., for the defendants, argued that the judgment of the learned trial Judge should be restored, on the ground that the road in question was not a deviation within the meaning of the Municipal Act. Reference was made to *County of Victoria v. County of Peterborough* (1889), Cameron's Sup. Ct. Cas. 608, and the same case in (1888), 15 A.R. 617, especially *per Osler, J.A.*, at p. 627.

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*J. L. Counsell*, for the plaintiffs, relied upon the judgment of the Divisional Court and the cases therein referred to. The merits of the case are with the respondents, as the road is admittedly useful to the defendants, and the money in respect of which the claim is made has been properly expended.

*Lynch-Staunton*, in reply.

April 15, 1912. GARROW, J.A.:—Appeal by the defendants from the judgment of a Divisional Court reversing the judgment at the trial of Middleton, J., who dismissed the action.

The defendant applied for leave to appeal, and such leave was granted, but confined to one point, namely, whether the road in question was and is a deviation road. See 2 O.W.N. 1223, and note at p. 592 of the report in 23 O.L.R.

The defendants' objections to an affirmative answer to this question seem to be: (1) as to its origin, which it is said was the Carroll plan; and (2) that the road does not return to the line of the original boundary line road allowance.

These objections are not unlike those considered by this Court in *Township of Fitzroy v. County of Carleton* (1905), 9 O.L.R. 686. There is evidence here, slight it is true, that before the registration of the Carroll plan the travelling public had used a road in the nature of a trespass road upon or near the line of the road afterwards laid out upon that plan, just as in the *Fitzroy* case a trespass road had preceded the formal action of the township councils. And in that case, as in this, the deviation did not terminate in the boundary line between the two townships where it originated, but was carried across another township boundary, and thence through that township into the original line. The question there arose under sec. 617, sub-secs. (1) and (2), of the Municipal Act, 3 Edw. VII. ch. 19. Here it arises under sec. 622, which does not contain the condition in sec. 617 that the deviation must be only for the purpose of obtaining a good line of road. But, notwithstanding that difference, the question what, under the statute, is a deviation road, must, under both sections, in my opinion, be practically the same. The statute gives no definition. Its object, no doubt, was, first, to assist the public in obtaining a practical highway, by enabling serious obstacles in the true line to be passed around; and, second,

to make the general provisions as to maintenance, whereby the burden is fairly apportioned, apply. The question is really more one of fact than of law. There must have been a sufficient excuse in the nature of the ground to justify an abandonment of the original line of road. And it must appear that the deviation was intended to serve and is serving the public need, which would have been served if it had been reasonably possible to open and use the original allowance; but its origin and history are of less consequence than the facts existing when the question arises, when the main inquiry must be, is the road now a public highway, and is it in fact serving the public purposes which a road upon the original allowance would have served? Its direction and its nearness to the original line are, of course, not to be disregarded, for a new road at right angles could scarcely be called a deviation within the meaning of the statute. But, while the general trend of the new road should be in the direction of the old, it is not, I think, imperatively necessary that the former should actually terminate in the latter. The statute does not say so, nor, in my opinion, does reason, so long as by means of some other public road the original line may conveniently be reached.

The facts here seem to be sufficient to justify the judgment of the Divisional Court. For over half a century the public, in passing and repassing along the boundary line road so far as it was opened, have used the new road, or deviation, to reach points which would have been reached over the original allowance if it had been opened. And that that was the intention is also, I think, established by the circumstance that the county council, before conveying the original allowance to Carroll, required a report from an engineer, which was furnished, that the new road was sufficient for public use. At that time, township boundary lines were under the jurisdiction of county councils; and, if the new road was not intended to be in substitution for the old, and therefore a deviation within the meaning of the statute, the matter in no way concerned the county council.

I would dismiss the appeal with costs.

MEREDITH, J.A.:—The single question raised upon this appeal is, whether, for the purposes of maintenance and improve-

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ment, that part of the public road in question in this action is or is not to be declared part of the town-line lying between the townships of East and West Flamborough; it is not upon the original allowance for that highway; but, for the plaintiffs, it is contended that it is a deviation from it such as is mentioned in the various municipal enactments and in respect of which the duty of maintenance and improvement attaches in the same manner as if it were actually upon such an allowance for such a road.

In considering such a question, regard must be had to the purposes of the legislation involved; and such purposes seem to me to contain the controlling influence in the consideration of this case.

The purpose of the legislation was to provide convenient roads for those to whom the Crown granted lands adjacent to them, as well as for all others who might lawfully use them; and, in such a case as this, the statute-imposed obligation to open, maintain, and improve town-lines, including all such deviations, is, in very plain words, put upon the adjoining townships.

So that it was the duty of the defendants, jointly with the Township of East Flamborough, to open, maintain, and improve the town-line in question; but, by reason of natural obstructions and difficulty in the way of such a work, that has hitherto been quite impracticable; and the law is not unreasonable; it gives power, upon certain conditions, to open a new road, in lieu of that laid down in making the original allowance for roads, and to close it; and it also provides for deviations; the result of all this seems to me to leave the defendants in this predicament: if that part of the road in question has not, for the purpose of maintenance and repair, become part of the town-line, the defendants are, jointly with the other township, under the statute-imposed obligation to open, maintain, and improve it—an alternative which they would no doubt gladly flee from, even though in so doing they ran into that which has been imposed upon them in this action.

I can perceive no good reason why that part of the road in question may not properly be deemed part of the town-line for the purposes of maintenance and improvement: it is co-extensive only with that part of the original allowance which is impassable;



if the town-line had to be opened, it was necessary that there should be either as extensive a deviation, or the expenditure of money vastly exceeding the amount required in making such a deviation; and, whether that is essential or not, this deviation leads back again to the original allowance, although its main purpose—a way into the city of Hamilton—is fulfilled before going as far as that. So, too, the main purpose of the original allowance for road, if opened, would be to give a way into that city.

The piece of road in question answers all the purposes of a deviation; and I am unable to perceive anything that materially stands in the way of that view of the case; unless it be that it is now not a deviation, but actually part of the line by reason of the closing of it, where naturally impassable, and the adoption of this piece in lieu of it; an alternative which would not be helpful to the defendants.

The trial Judge seems to me to have taken quite too narrow a view of that which a deviation may be.

I would dismiss the appeal.

Moss, C.J.O., MACLAREN and MAGEE, JJ.A., agreed that the appeal should be dismissed.

*Appeal dismissed with costs.*

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## [IN THE COURT OF APPEAL.]

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## CLARK V. LOFTUS.

*Life Insurance—Benefit Certificate—Change of Beneficiaries—Person Benefiting by Change—Validity—Onus—Agreement, not to Change—Failure of Proof—Mental Capacity of Assured—Fraud—Undue Influence—Fiduciary Relationship.*

The assured had apportioned the insurance moneys to arise from an endowment certificate upon his life, among his wife and two daughters; but, while living at the house of one of his daughters, shortly before his death, and when he was in a feeble state, he purported, by the execution of a written instrument, to change the apportionment so as to make that daughter (the defendant) the sole beneficiary:—

*Held* (GABROW, J.A., dissenting), that no agreement between the assured and his wife to the effect that the assured would make no change in the beneficiaries, was proved; that the onus was upon the plaintiffs to shew that the instrument changing the apportionment was invalid and ineffectual, and they had not discharged that onus; and that the defendant was entitled to the insurance moneys, subject to repayment to the widow of the assured of the sums paid by her to keep the certificate alive (as agreed to by the defendant).

Judgment of a Divisional Court, 24 O.L.R. 174, reversed.

*Per* MOSS, C.J.O.:—The assured had the right by law to change the nomination of beneficiaries within the scope of the certificate; and, in order to avoid his act, it was incumbent upon those impeaching its effect to shew mental incapacity or fraud or undue influence, or such a fiduciary relationship as would shift the onus; and the plaintiffs had shewn none of these things. The affirmative is not proved, because the witness for the negative is not wholly and entirely to be believed (*Nobel's Explosives Co. v. Jones* (1881), 17 Ch.D. 721, 739). The evidence failed to establish a want of capacity in the assured to understand the nature of the transaction or to appreciate its effect.

*Per* MEREDITH, J.A.:—"Righteousness," as applied to proof in such cases as *Fulton v. Andrew* (1875), L.R. 7 H.L. 448, means no more than that the document propounded is really the will of the testator: to import into the word any such meaning as that it must be proved that the will is a fair or just one, or such as a reasonable man ought to make, is entirely wrong. The onus shifts; presumption of knowledge and approval of the contents of the will, from proof of its due execution by a competent testator, to whom the will was read over, or who has read it, is displaced: actual knowledge and approval must be proved by those who take a benefit under it and who have been instrumental in making it; the conscience of the Court must be satisfied, that is all. The circumstances were not such as to make it necessary that the deceased should have the advice of an independent solicitor when effecting the change of beneficiaries. The agreement relied on was not proved. The wife could not be a "beneficiary for value," not being expressly so designated in the certificate. And the Courts below had not found, and there could not, on the evidence, be a finding of, either want of mental capacity or undue influence.

*Per* GABROW, J.A.:—The substantial issue between the parties arose upon the plaintiffs' allegation of fraud and undue influence on the part of the defendant in procuring the assured to execute the instrument effecting the change of beneficiaries; and that issue, which alone was sufficient to dispose of the whole case, should be found in favour of the plaintiffs.

APPEAL by the defendant from the judgment of a Divisional Court, 24 O.L.R. 174.

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January 15. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*G. H. Watson*, K.C., and *J. T. Loftus*, for the defendant. As to the alleged agreement between the husband and wife that the apportionment should not be changed, it is submitted that no binding agreement has been proved; and, in any event, it could not be given effect to, having in view the amendment of sec. 151 (3) of the Insurance Act, R.S.O. 1897, ch. 203, by 1 Edw. VII. ch. 21, sec. 2 (5), which provision must be considered to be retro-active. This states that no one can be a beneficiary for value unless expressly so designated in the certificate. To revive the references to the sections of the Act, reference is made to R.S.O. 1897, ch. 203, sec. 80, amended by 3 Edw. VII. ch. 15, sec. 3 (2); R.S.O. 1897, ch. 203, sec. 151 (3), (4), (5); sec. 159, sec. 160 (1), (2). Sub-section 3 of sec. 151 of R.S.O. 1897, ch. 203, is amended, as has been stated, by 1 Edw. VII. ch. 21, sec. 2 (5). Then sub-sec. 6 of sec. 2 of the last-mentioned Act amended sub-sec. 2 of sec. 160 of R.S.O. 1897, ch. 203. Thus these two sub-sections introduce into secs. 151 and 160 of the Insurance Act the same words. Then 3 Edw. VII. ch. 15, sec. 3 (2), amends sec. 80 of the Insurance Act, giving the beneficiary the right to sue in his own name. So that the defendant has an absolute statutory right to sue to recover these moneys. The plaintiffs failed to prove want of mental capacity on the part of the deceased to make the change of beneficiaries in question, or that there was any fraud or undue influence exercised by the defendant, or that the defendant stood in a fiduciary position towards her father. Nor has there been any finding on any of these points. There was at most only vague suspicion of fraud or undue influence. The learned trial Judge erred in treating the document of transfer as a will, and applying to it certain rules applicable in some cases to testamentary dispositions. The document was not a testamentary disposition, and the rule invoked had no application to it. The learned trial Judge erroneously held that there was an onus cast upon the appellant herein: *Low v. Guthrie*, [1909] A.C. 278, which modifies *Tyrrell v. Painton*, [1894] P. 151. The case of

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*Book v. Book* (1900-01), 32 O.R. 206, 1 O.L.R. 86, rather went off on the ground that the beneficiary did not take as wife but as secured creditor. Besides, sec. 151 (3) was not in force at that time. The onus was upon the plaintiffs to prove their case, and in this they have failed. The affirmative is not proved merely because the witness for the negative is not wholly believed: *Nobel's Explosives Co. v. Jones* (1881), 17 Ch.D. 721, at p. 739. There was no duty cast upon the defendant to advise her father as to the nature and effect of his action in altering the apportionment. The Court has nothing to do with the fairness or unfairness of the transaction, though that consideration seems to have influenced one of the learned Judges below in his placing this case within the principle of *Fulton v. Andrew* (1875), L.R. 7 H.L. 348. The change which was made was Clark's act and deed, and that is all which it is necessary to shew.

*J. B. Clarke*, K.C., and *E. J. Hearn*, K.C., for the plaintiffs. At the time he signed the instrument of transfer, Clark lacked the mental capacity to comprehend the nature of the instrument or the effect of what he was doing, and the defendant, taking advantage of his mental condition, and by the exercise of fraud and undue influence, induced him to sign the transfer. Even if competent, he was precluded from altering the original nomination of beneficiaries, by reason of the agreement between himself and the plaintiff Jane Clark that he would not make any change in the beneficiaries. This agreement was made before the passing of the amendment to the Insurance Act (1 Edw. VII. ch. 21, sec. 2 (5).) This amendment is not retrospective, and does not apply to this case. In any event, the agreement is not within the provisions of the Act. In the circumstances of this case, the onus was upon the defendant to shew that the deceased thoroughly understood what he was doing, or at least that he had been protected by independent advice: *Phillips v. Mullings* (1871), L.R. 7 Ch. 244; *McCaffrey v. McCaffrey* (1891), 18 A.R. 599. In view of the facts found by the learned trial Judge, the document relied upon as making a change of beneficiaries ought not to stand: *Fulton v. Andrew*, L.R. 7 H.L. 448, at p. 471; *Tyrrell v. Painton*, [1894] P. 151; *Adams v. McBeath* (1897), 27 S.C.R. 13; *Collins v. Kilroy* (1901), 1 O.L.R. 503; *Low v. Guthrie*, [1909] A.C. 278; *Malcolm v. Ferguson* (1909), 14 O.W.R. 737, 1 O.W.N. 77; *Kreh v. Moses*



(1892), 22 O.R. 307; *In re Jansen* (1906), 12 O.L.R. 63; *Milroy v. Lord* (1862), 4 DeG. F. & J. 264. From the time of making the agreement, Clark was a trustee of the policy for the beneficiaries named therein, and the appellant, having knowledge of the agreement and taking the benefit of it, is bound by its terms, and is not entitled to take any further benefit arising from a breach of the trust which she actively assisted in bringing about, and prepared and witnessed herself: *Allen v. Wentzell* (1909), 7 E.L.R. 575. The certificate, or policy, was subject to the rules of the Order in respect to the change of beneficiaries. See rule 150. We also rely on the reasons given in the judgments below.

*Watson*, in reply. There is the right to transfer without reference to the rules and conditions. See rule 147; also *Mingaud v. Packer* (1891), 21 O.R. 267, affirmed in (1892), 19 A.R. 290; *Neilson v. Trusts Corporation of Ontario* (1894), 24 O.R. 517; *Re Harrison* (1899), 31 O.R. 314. The other side rests its case on suggestions, suspicions, and equities. There was no fiduciary relationship, and so the doctrine as to necessity of independent advice has no application: *Wallis v. Andrews* (1869), 16 Gr. 624, at p. 641; *McEwan v. Milne* (1884), 5 O.R. 100; *Trusts and Guarantee Co. v. Hart* (1901), 2 O.L.R. 251, affirmed in (1902), 32 S.C.R. 553; *Fisher v. Fisher* (1902), 1 O.W.R. 442; *Vandusen v. Young* (1902), 1 O.W.R. 55; *Christian v. Poulin* (1902), 1 O.W.R. 275; *Thorndyke v. Thorndyke* (1902), 1 O.W.R. 11. The effect of the statute since its amendment has been considered in several cases. See *Re Murray* (1904), 4 O.W.R. 281; *Lints v. Lints* (1903), 6 O.L.R. 100; *Cartwright v. Cartwright* (1906), 12 O.L.R. 272; *In re Cochrane* (1908), 16 O.L.R. 328.

April 15. Moss, C.J.O.:—One James E. Clark, a member of the Independent Order of Foresters, and the holder of an endowment certificate issued by the Order, and dated the 6th March, 1893, for the sum of \$3,000, payable as in the certificate set forth, died on the 16th February, 1910. Thereupon a dispute arose between the parties hereto as to the right to receive payment from the Order of the \$3,000 in question. The amount, less expenses, was paid into Court by the Order. Pursuant to an order of Court, these proceedings were instituted for the determination of the question as to which of the parties was entitled to the moneys,

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and, if more than one was entitled, the proportions in which they were to share.

In the certificate all three were named as beneficiaries; but, by an instrument signed by him and dated the 29th November, 1909, Clark designated the defendant Florence Loftus as the sole beneficiary, reserving to himself the right of revocation and substitution of other beneficiaries in accordance with the constitution and laws of the Order. This instrument remained unrevoked at the date of his death.

The question for trial, therefore, was as to the validity of this instrument. It was not admitted by the plaintiffs, but at the trial it was clearly proved, that the signature attached to the instrument was Clark's; and it is not open to question that, as executed by him, it is in form and substance sufficient to effect the desired change of beneficiaries.

But the plaintiffs alleged that, at the time he signed the instrument, Clark was in such a mental condition as to be unable to comprehend the nature of the instrument or the effect of what he was doing, and that the defendant, taking advantage of his mental condition, and by the exercise of fraud and undue influence, induced him to sign the instrument. They further alleged that, even if competent, he was precluded from altering the original nomination of beneficiaries, by reason of an agreement between him and the plaintiff Jane Clark that he would not make any change in the beneficiaries.

The learned trial Judge held the instrument of the 29th November, 1909, to be invalid and ineffective, but chiefly on his view as to Clark's mental condition when he signed it and as to the duty which he considered was cast upon the defendant of satisfying the Court that Clark properly understood and appreciated the effect of his act. He also expressed the opinion that an agreement was in fact made between Clark and the plaintiff Jane Clark; but, in view of the amendments made to secs. 151 and 160 of the Ontario Insurance Act, he rested his judgment principally upon the other branches of the case. In the Divisional Court the judgment was affirmed upon the latter grounds. Mr. Justice Clute, by whom the principal judgment was delivered, held that, in view of the amendments, effect could not be given to the agreement. The Chief Justice of the Common Pleas reserved his

opinion as to the effect of the amendments. Mr. Justice Teetzel agreed in the result. So far, therefore, as expressed opinions are concerned, it may be taken that, while it has been found that there was an agreement in fact, it could not avail to preclude Clark from making the change of beneficiaries. As I have reached the conclusion that an agreement in fact has not been proved, it is not necessary to consider the effect of the statute as amended. As to what is said to have taken place between Clark and the plaintiff Jane Clark on this point, there is no conflict of testimony—the proof resting upon what was deposed to by the two plaintiffs, taken in the light of subsequent conduct and events. Upon the testimony, I am, with deference, of the opinion that no agreement is shewn. I think that, at the time in the year 1900 when it said the agreement was come to, there was no bargaining and no intention to bargain about the matter. It happened that Clark, through losses in his business and inability owing to poor health to earn any considerable income, concluded that he was unable to keep up the payments called for by the certificate.

The matter appears to have come up in conversation between him and the plaintiff Jane Clark, who had separate means. In her testimony in chief she thus stated what took place: “Q. When he failed in business did he say anything to you about this insurance? A. Yes, he came and told me that it was to my benefit and to the benefit of the children to keep that policy up. Q. What else did he say? A. He said that we were—as we were beneficiaries for value—Q. He said that you were to pay the usual assessments? A. Yes. Q. And if you did not, what would happen? A. He said it would be a loss to me and to the children. Q. How would it be a loss to you and the children? A. Simply because I was paying on it, and of course he said he had no means to pay it. . . . Q. Then he said it was for the benefit of you and the children? A. Yes. Q. What children? A. We never made any difference between Florrie and my own. We were all very agreeable. Q. You were to pay the usual assessments for the benefit of yourself and the children? A. Yes. Q. Did you pay the dues and assessments after that? A. I did.” On cross-examination she was asked: “Q. What happened in relation to the insurance? A. Well, he had no money to pay on it, and I paid it. Q. That was all? A. Yes; I paid it. Q. Was

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there anything said? A. Yes; he told me it was a benefit for me and my children to keep that policy paid, and I did so out of my own means. . . . Q. But he did not make an agreement with you or anything of that kind? A. Yes; he told me that me and my daughters were beneficiaries, and that it was to my benefit to keep the policy paid-up and for the benefit of the children. His Lordship: Q. Your children included? A. Yes. Mr. Loftus (counsel for the defendant): Q. Why didn't you state that before? A. This is the first time I have had anything to do with anything like this. That's right, and Mrs. Loftus knows it . . . Q. That is all that was said? A. That is all; he said it was to our benefit."

The testimony of the other plaintiff, though varying slightly in terms, does not carry the matter further. It is true that to the question "Was there anything said about it?" she answered: "Yes; my father told my mother in my presence that he had no means since he failed, and that it was to her benefit, my sister's and my own, to pay that insurance; and, as he had no money to do it, that she should do so out of her own money, and that she should be benefited by it hereafter, *and that it would be hers.*" But, in her answer to the next question, she shews that it was not her understanding that it was to be her mother's any more than any of the others. Asked, "Were you to get any benefit of it?" she answered, "Yes; the understanding was that we were to share and share alike." Now, making all proper allowance for the suggested inexperience as a witness of the plaintiff Jane Clark, which may be considered as very fairly offset by the assistance rendered by her counsel in the form of leading questions, I am unable to find in this testimony the ingredients of an agreement such as has been found. Clark stated what was very probably true, that he was unable to pay, and said what was obviously true, that it would be to the benefit of the beneficiaries to keep the certificate on foot. He put it before his wife as a matter for her consideration, but he made no request that she should pay or any stipulation as to what he would do or would not do if she continued the payments. That matter was never considered or discussed by them. She was left free to act on his suggestion or advice or not at her pleasure. Whether as a matter of fact some of his means were not employed in making



some of the subsequent payments is by no means clear. It is shewn that he turned over his earnings to his wife, and there was a common fund. As shewing that she knew that she was not bound to continue the payments herself, she admits that she made application to the defendant to contribute. Payments were continued to be made by or through her up to the 30th September, 1908, when she ceased making them—and, but for the subsequent payments being continued by the defendant, the certificate would, in all probability, have lapsed. So far as the plaintiffs were concerned, they had abandoned all intention or desire to keep it on foot any longer.

The element of agreement should, I think, be entirely eliminated from the case.

Upon the other branches I am also unable to agree to the conclusions reached by the trial Judge and the Divisional Court. These conclusions appear to me to be based upon a misapprehension as to the duties and obligations of the defendant under the circumstances disclosed by the testimony and as to the onus of proof at the trial. No doubt, the burden may shift from time to time during the progress of the trial, and it may be assumed that in the course of this trial the onus varied from time to time as in other cases. The question is, upon whom was it resting, having regard to the testimony given, at the time when the evidence closed?

It having—as before mentioned—been shewn beyond question that the instrument impeached was signed by Clark, it is scarcely necessary to say that the onus of shewing that it was for some reason or reasons invalid and ineffectual was cast upon the plaintiffs.

Clark had the right by law to change the nomination of beneficiaries within the scope of the certificate, and in order to avoid his act it was incumbent upon those impeaching its effect to shew mental incapacity unfitting him to execute the instrument with knowledge and appreciation of its effect, or that he was induced to execute it through fraud or undue influence, or that the defendant, in whose favour the nomination was made, stood in a fiduciary relationship towards her father, that is, that she occupied such a position of trust and confidence in regard to him as necessarily to lead to the conclusion that she possessed a controlling influence over his mind and actions. If the latter case were established,

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then the onus might be cast upon her to support the transaction, and the question whether she had satisfactorily shewn all that was required would arise, but only in that case.

It was not alleged nor was it proved or found that the defendant stood in a fiduciary position towards her father. She was his daughter, but she was neither his trustee, guardian, or agent. There is no evidence that at any time during his life had he proposed any special trust or confidence in her. There existed between them nothing but the natural affection of father and daughter; no relationship that called upon the daughter to justify or explain her father's action. Assuming capacity and the absence of fraud or undue influence, the act was one within his right, however unreasonable or unjust towards others it may appear. Apart from agreement, with which I have already dealt, Clark was in no manner a trustee of the certificate or for any of the parties named as beneficiaries; and his act is binding and conclusive, unless the plaintiffs have proved a case of mental incapacity or fraud or undue influence.

I have given careful attention to the evidence, as well as to the adverse comments of the learned trial Judge upon the testimony of some of the witnesses; and, after making every allowance for the advantage which is necessarily enjoyed by the trial Judge from having seen the witnesses and noticed their demeanour, I am unable to adopt the conclusions arrived at. It may be that, if I shared the views of the Courts below as to the burden of proof, I should not disagree with their findings. But if, as appears to me, it lay upon the plaintiffs to prove their case, then, I think, they failed to discharge the onus.

It has been said more than once that it is a fallacy to suppose that the affirmative is proved because the witness for the negative is not wholly and entirely to be believed. The affirmative must be proved; and to say that a witness for the negative is not wholly to be believed is, in no sense of the word, to prove the affirmative: *Nobel's Explosives Co. v. Jones*, 17 Ch.D. 721, at p. 739.

The learned trial Judge was disposed to deal with the question of capacity as upon the same footing as if the act was a testamentary act. As the instrument was intended to take effect in Clark's lifetime, it was probably more in the nature of, though not in all

respects similar to, a gift *inter vivos*. It differed from the latter in that it was not absolute in effect, because of the reservation of a power of revocation.

But, however regarded, the evidence fails, in my judgment, to establish a want of capacity to understand the nature of the transaction or to appreciate its effect. Clark was, no doubt, in poor health and had been so from the time when he suffered from an attack of paralysis in January, 1909. According to the testimony of the plaintiff Jane Clark, he was then in the hospital for about three weeks, after which he returned home. In April he was sufficiently recovered to go to visit an old friend, the witness Crompton, at his farm near St. Catharines, where he remained until some time in June, a period of about eight weeks. He appears to have been considered as of sufficiently good health and capacity to take care of himself to be allowed by the plaintiffs to make the journey each way unattended. The evidence fails to shew any material failure in health or mind between his return in June and the signing of the instrument on the 29th November. He appears to have suffered pains in his head produced by a blow from a trap-door in his factory falling upon him, and which induced the first paralytic condition. But he went about the streets conversing with his neighbours and calling upon his daughter the defendant, without it occurring to any one that he should be attended. The trivial incidents related by the plaintiffs as indicating mental weakness are wholly insufficient to establish want of capacity, or inability to understand what he was doing when he signed the instrument. It was a single and simple transaction in connection with a certificate with the purport and effect of which he was quite familiar, for he had considered and discussed it on more than one occasion. His signature appended to the instrument compares quite favourably with that appended to the agreement concerning the additional rates made with the Order in September, 1908, and presents every appearance of having been written by one quite capable of controlling his faculties. And it is to be noted that the learned trial Judge says that he is not satisfied that Clark had not testamentary capacity.

Beyond vague suspicion, there is really no evidence of fraud or undue influence such as is required to be shewn in order to invalidate such an act as that here impeached. It is important

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to bear in mind that there was no secrecy about the matter; no retaining the instrument so as to prevent scrutiny and inquiry. It was sent on to the Order immediately, and the plaintiffs were afforded opportunities not only of seeing the instrument, but Clark was shewn to have visited the plaintiffs from time to time afterwards, and they had every opportunity of ascertaining whether or not any improper suggestions had been made to him or his mind otherwise unduly influenced. But, beyond endeavouring to induce the Order to refrain from recognising the instrument, nothing was done or attempted.

The defendant had paid the arrears due in respect of the certificate after the plaintiffs had abandoned making payments, and she kept it on foot from that time onwards. Otherwise it would have lapsed and have been of no benefit to anybody. Having done so, there was no reason why her father should not, if he chose, put her in the position of sole beneficiary. In doing so he was not bestowing upon her an extravagant sum, and he may very justly have considered that, his wife having considerable property of her own and having shewn no disposition to keep the certificate on foot, his daughter by his first marriage, through whose payments it had been kept on foot, might without unfairness receive the full benefit of it.

I would allow the appeal and declare the defendant entitled to the moneys in Court, subject, however, to repayment to the plaintiff Jane Clark of the sums paid by her in respect of dues and assessments as offered and agreed to by the defendant's counsel.

As to the costs, the defendant is entitled to her general costs of the interpleader proceedings, of the issue, and of the appeal to the Divisional Court and to this Court.

MEREDITH, J.A.:—The dominating factor in the conclusions reached in this case hitherto was that which was considered great unfairness in the result of the transaction which is in question in this action; had that result been the opposite of that which it was, that is, had it changed the beneficiaries from the one only to the three, no one can doubt that it would have been unhesitatingly and firmly upheld. It was its want of "righteousness" that caused its downfall.

Mr. Justice Clute seems to me to have put that very plainly, for himself and as to the trial Judge. After quoting the oft-



quoted words expressed by Lord Hatherley in the case of *Fulton v. Andrew*, L.R. 7 H.L. 448, at p. 472: "But there is a further onus upon those who take for their own benefit, after being instrumental in preparing or obtaining a will. They have thrown upon them the onus of shewing the righteousness of the transaction;" he goes on to say: "The rule appears to me to be applicable to a case of this kind, which closely resembles the case of a will. So far from the evidence removing the suspicious nature of the transaction and shewing the same to be a righteous transaction, quite the reverse is the case. The learned trial Judge largely discredited the evidence of the defence, and considered the transaction a most unrighteous one."

So that two things seem to me to be evident: (1) that there has been a grave misunderstanding of the meaning which Lord Hatherley intended to convey by the word "righteousness;" and (2) that this case is not at all like that with which he was dealing, or such cases as *Barry v. Butlin* (1838), 2 Moo. P.C. 480, or *Tyrrrell v. Painton*, [1894] P. 151.

"Righteousness," as applied to proof in such cases, means no more than that the document propounded is really the will of the testator; that it is the duty of those asking the Court to pronounce in favour of the will, to prove affirmatively that the testator knew and approved of its contents: to import into the word any such meaning as that it must be proved that the will is a fair or just one, or such as a reasonable man ought to make, is, of course, entirely wrong: a testator may be as unreasonable, unjust, or capricious as he pleases, without the Court having any power to control him; the character of the will may, of course, afford evidence upon the question whether the paper propounded is really the testator's will; but some care must be taken fairly to treat such things only as evidence; that we do not make them an excuse for finding against the validity of the will really because we do not approve of its contents. The man or woman who makes a will is, it may be, the only one who knows what is just and fair; and, in the absence of such knowledge as he or she could impart, one should be very careful of condemning his dispositions of his property.

On the other point it is not necessary to do more than point out that this is not the case of a controversy arising for the first

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time after a testator's death in propounding a writing as his last will and testament; the controversy arose in his lifetime, and was carried on for some time before his death and before his second stroke of paralysis, and carried on by him, on the one side, seeking registration of his change of beneficiaries, and the respondents, on the other side, opposing it, in the offices of the friendly society whose certificate of insurance is the subject-matter of this litigation. If there had been any real doubt of the man's knowledge and approval of the change he had made, or of his capacity to make it, or that he had duly signed the writing, all that could at once have been set at rest, by asking him; but that was not done, nor was any attempt, on the part of the respondents, made to investigate it; they knew that it had been done, and that they could not undo it.

The learned trial Judge said, among other things in which I am quite unable to agree with him, that "the law calls upon the person who so takes to explain the circumstances in such a way as to remove all shadow of suspicion from the mind of the Judge who is called to pass upon the case." The rule is simply this: the onus shifts; presumption of knowledge and approval of the contents of the will, from proof of its due execution by a competent testator, to whom the will was read over, or who has read it, is displaced: actual knowledge and approval must be proved by those who take a benefit under it and who have been instrumental in making it: the conscience of the Court must be satisfied, that is all.

Again, I am quite unable to agree with him in these observations also contained in the reasons for his judgment: "The situation was one which, more than any other situation one can think of, called for the exercise of great precaution. I think it called for Mr. Clark receiving advice from an absolutely disinterested and independent solicitor." It was but a single transaction, of a very ordinary and simple character; the man had become dissatisfied with his home, and desired to change it, to go and live with the only child of his first wife. He may, or may not, have had real cause for that desire; that in itself is not material; he had, as I have said, a right to be capricious; he had a right to do just as he pleased with his own. His conduct was not unique, it was not even extremely uncommon; as one grows

old, the impressions of earlier days are more vivid and attractive than those of later days, and one is apt to become exacting and more readily dissatisfied; and there is at least this to be said in extenuation of this conduct of the man who is not here to justify himself, that no great efforts, if indeed any efforts, were made to dissuade him from going away or to induce him to remain or return. He had got to that age and condition of health that he was, no doubt, more or less a burden to those with whom he lived, and there can be little, if any, doubt that, rightly or wrongly; he was impressed with the idea that his wife thought so. I am quite unable to perceive anything so complicated or extraordinary in the circumstances as to require the services of any solicitor, or what there was in the simple and single transaction that any layman could not quite comprehend. The man knew that his wife and two children were to share equally in the money payable under the certificate upon his death—if not changed; he knew that he wanted to change that so that one daughter should have all; and that all that was needed to effect the change, could be readily accomplished through the officers of his "lodge." He knew also that his wife had property of her own, of considerably greater value than this certificate; and that he had no other property which could go to the child of his first wife.

The learned Judge was also emphatic in the opinion that Clark ought to have been advised that he was receding from a binding bargain, made with his wife, that the beneficiaries of the certificate should not be changed. In that I am also quite unable to agree, because: (1) no such agreement is proved; and (2), if there had been, there would be no object in advising him not to do a thing he had no power to do. If there were no binding agreement, it was no part of a solicitor's duty to advise him on the moral aspect of his conduct; a solicitor has enough to do in keeping his client right in law.

That there was no such agreement in fact seems to me to be plain enough. Notwithstanding the controversy which arose fully and sharply in the man's lifetime, there was no assertion of any such contract. In the first statutory declaration of the wife, in her opposition to the change being made in the society's records, she made no sort of assertion of any such agreement.

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In a supplementary declaration, made eight days afterwards, for the sole purpose of making such a claim, she put it in these words:—

“1. That when I began to pay the assessments on the benefit certificate on the life of my husband, James Clark, about eight years ago, as set forth in my said former declaration, it was at the request of the said James Clark that I did so, he intimating to me that, as my daughter, May Clark, and myself were two of the beneficiaries named in the said policy, and as he had failed in business, his membership in the Order and the benefit certificate would have to lapse, unless I kept the assessments paid, and many times after that, through the period of about seven years that I kept the assessments paid out of my own money, he frequently spoke to me, encouraging me to keep the assessments paid, and I did so with his knowledge and on the understanding that myself and my daughter May were to be beneficiaries for value in the said benefit certificate.

“2. I am sure that my husband did not expect, during that period, that he would be able to change the beneficiaries in the said policy from myself and our daughter, May Clark, without my consent and her consent, and I would not have paid the said assessments or any of them, but for the fact that she and I were two of the beneficiaries named in the said benefit certificate. And I now claim, as the fact is, that she and I are beneficiaries for value, and I positively object to any change being made in the beneficiaries as they stand in the said benefit certificate.”

Not only is no such contract proved, but, if the case had been tried by a jury, there would have been no reasonable evidence to submit to them in support of any claim that there was.

The man, having been obliged to give up his business, and his earning powers being greatly impaired, was unable to keep up the periodical payments necessary to keep the certificate in force; there were then, practically, but two things which might be done, either abandon it, or else make the payments through the family purse, to which his wife, through the property which she owned, appears to have been the chief contributor from that time on. To abandon would have been foolish; to keep up the payments in that way was really the only thing to be done; and they all acted accordingly, until the man left the household and went to live



with his oldest child, when payment out of the household purse ceased, and payment was taken up by that child.

There is really no sort of evidence of any kind of a binding agreement; if there had been, the wife broke it when she ceased making payments, and contradicted, if she did not break, it, when she, long before that, endeavoured to make the oldest child contribute towards the payments.

There could have been no contract unless the wife was bound by it; and how was she in any sense bound? How could she have been compelled by any one to make the payments? Nor was it suggested, by any of the witnesses, that the husband was to retain any separate legal right to an interest in the certificate, or to any of the moneys which might become payable under it; so that, if the wife had taken over the insurance, as she now claims, it would not be for value; all the payments which she made would be voluntary and for her own benefit only; but that was not the character or effect of the dealings between them; it was merely the case, and the not uncommon case, of keeping up the payments out of the family purse, as I have said. There is no suggestion by any one that any kind of provision was made for the possibility of the benefits of the certificate becoming available in the man's lifetime; that was never taken into consideration, as it must have been if the parties were definitely contracting in regard to the rights to accrue under the certificate. It was simply the common case of the family taking up the burden of the payments, when the head of the house became disabled from fully meeting them. The man did not cease to pay, he continued to pay all that he was able to pay; his earnings, though perhaps little, all went into the family purse. No attempt was made to procure an assignment of the certificate or of any rights under it, nor was anything of the sort even suggested, as it doubtless would have been if the man were to be precluded of all his rights under it. It was the every day case of trusting to the husband and father not to alter his will. It is out of the question to speak of any one as a beneficiary for value of this certificate; such a contention is really like catching at a straw to save oneself from drowning.

But, if any one had been meant to be a "beneficiary for value," it would be in the teeth of the plainly and emphatically expressed intention of the Legislature that no one can be a beneficiary for

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value unless expressly so designated in the certificate; and I decline to attempt to dodge that enactment because I am carrying a hard case which tempts me to do so. If the man had lived long enough to become dissatisfied with his new home, and had gone back to his old one, and had again changed the beneficiaries, back to his wife and her daughter, a thing which might very well have happened, I can hardly think the other daughter would be held to be a beneficiary for value, although she took on, even, a former understanding that if she paid the premiums the benefits would be altogether hers.

There is no finding of want of mental capacity, on the part of the man, to make the change of beneficiaries in question; really the contrary has hitherto been found, and rightly so. The man was, no doubt, much impaired in physical and mental vigour; it may be that he was not either physically or mentally capable of carrying on any trade or business, but many an one may be so incapable, and yet capable of making a will; and in this case there was unquestionable mental and physical capacity to make, and thoroughly understand, the change of beneficiaries which he did make—there can be no doubt he knew the simple fact that he was taking from his wife and his daughter, by her, one-third each of the \$3,000 so paid under the certificate, and giving the whole sum to his only child by a former wife, a thing which, wise or unwise, just or unjust, he was determined to do; and there can be no doubt that when doing it he knew that his wife had property of her own, and that her son and daughter were able to earn, and were earning, their own living; he knew a vast deal more than we can on the subject of the moral righteousness or justness of his act.

Nor has it been found that there was any undue influence exercised by any one over the man to bring about the change; indeed, it seems to be plain that the intention originated in himself, arising, in part, at all events, in his dissatisfaction, whether reasonable or unreasonable, with his own home, and in his desire to leave it. There was nothing like exclusion from intercourse with his wife and her children after he left the household; he was indeed a frequent visitor there, according to the wife's testimony, even while the contest over the change of beneficiaries was being waged in the society:—

“Q. You say he went to Mrs. Loftus in November, 1908;

had he been at your house after that? A. Yes, he came over next morning, and came over every other day for a week or so, while he was able to go out.

"Q. Up to what date? A. I don't know, but I know he came over the whole time he was there, while he was able to go out; while he was able to walk from Mrs. Loftus's, he came over to see me.

"Q. He was able until after New Year's; was he over after New Year's to your place? A. Well, I cannot say whether he was or not; he was over, but he had two strokes in Mrs. Loftus's house. I did not know when he had them. I was not notified of them.

"Q. Was he over after the first stroke? A. Yes, after the first stroke he had at Mrs. Loftus's.

"Q. That was about the New Year? A. Then he came over after that."

After the inability of the trial Judge—though so strongly desirous of upsetting the transaction—to find undue influence, and after the inability of the Divisional Court to do so, it would be an extraordinary thing for this Court to do so, even if there had been some substantial evidence of it, and even if the persons concerned were not the reputable people the evidence shews them to be.

If I were at liberty to substitute my will for that of the dead man in the distribution of this money, I would very willingly cancel the later "designation" and set up the earlier one, in accordance with my sense of what would be fairer and juster, in the dim light which the case throws upon the knowledge which the man had, and upon his real and full reasons for acting as he did; but, as I have no manner of doubt that the change was made by him of his own free will, I have no more power to alter it, according to my notions of moral right and wrong, than he, if living, would have to change my will.

I would allow the appeal and give effect to the change, which was made under the statute, and so is not controlled by the rules of the society. According to the practice of this Court, and, as I understand, the consent of the appellant, the money paid by the respondents or any of them in keeping the certificate in force, with interest, should be repaid out of the fund in Court.

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I have not gone into the question, dealt with by Mr. Justice Clute, whether any such rule as that involved in the case of *Andrew v. Fulton* is applicable to such a case as this; that is not necessary; if the transaction were a contract, it would not apply; if it were a gift merely, some such rule might very well be applied, for after all it comes down to this simply: Was the act, mentally and physically, really that of the donor?

MACLAREN and MAGEE, JJ.A., agreed in allowing the appeal.

GARROW, J.A. (dissenting):—Appeal by the defendant from the judgment of a Divisional Court affirming the judgment of Middleton, J., in favour of the plaintiffs, upon the trial of an issue between the parties as to the ownership of certain money in Court, the proceeds of a policy on the life of the late James E. Clark.

James E. Clark was the husband of the plaintiff Jane Clark, his second wife, and the father of the plaintiff May Clark. He was also the father of the defendant, by his former wife.

The policy, dated the 6th March, 1893, was in the form of an endowment certificate issued by the Independent Order of Foresters, and the beneficiaries therein named were the plaintiffs and the defendant in equal shares.

In the month of January, 1909, James E. Clark had a severe stroke of paralysis, from which he never completely recovered. Up to the month of November, 1909, he resided with his wife and children, other than the defendant, in a house owned by his wife, but on the 22nd of that month he left his home and went to reside with the defendant, where he remained until his death on the 16th February, 1910. After the stroke, he had been in the habit of going frequently to the defendant's house. Two days before he went finally to reside with her, he informed her of his intention to leave home.

In her evidence the defendant said: "About the 20th of November my father came to me, and he was crying; he started crying and said they had another quarrel over home with Mrs. Clark, and that he was not going to stand her nonsense any longer; that, if I could not take and do anything for him, he would go into some Home, and it was then we first spoke about his coming to live with me. He came two days after that."



On the day that the deceased came to live with the defendant, steps were taken to alter the apportionment of benefit under the policy by giving it all to the defendant, and a written document to that effect was prepared and executed by the deceased and sent to the insurers, but had not been assented to by them in his lifetime. The defendant says that the suggestion came first from the deceased; but, even on her own shewing, she seems to have had no compunction in accepting the change, and even in assisting her father to bring it about.

There had, as the plaintiffs contend, been an agreement between the deceased and the plaintiff Jane Clark, made several years before his death, that, if she would keep up the payments of premium on the policy, the deceased would not change the apportionment. And, in pursuance of this arrangement, the plaintiff and her daughter May had made a number of payments of premiums. At the time of the first paralytic stroke, there were some arrears. These were, at that time, paid by the defendant, who continued to pay the premiums until her father's death, the total of such payments amounting to about \$82.

There was conflicting evidence as to the mental condition and capacity of the deceased at the time when the document changing the apportionment was executed; the witnesses for the plaintiff stating that he had then become weak in mind, as well as in body, while those of the defendant considered him to be in his normal condition, although weak in body.

Middleton, J., was of the opinion that the circumstances brought the case within the rules as to testamentary dispositions procured or brought about by a beneficiary, laid down in such cases as *Barry v. Bulfin*, 2 Moo. P.C. 480, and subsequent cases; that, from the month of September before his death, "the old man's mind was in the extremity of weakness, and that he was not fit to exercise testamentary powers, unless he had very careful guidance to see that all proper precautions were taken to compel him to realise the actual situation. . . . I am not satisfied that he had not testamentary capacity; but I think it is incumbent upon those attempting to set up any testamentary act or any act in the nature of a testamentary act to see that all extraneous influence was excluded." And that he should have received advice from an absolutely disinterested and independent solicitor.

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The learned Judge also expressed dissatisfaction with the explanation of the transaction in its inception given by the defendant. And he held that the agreement between the deceased and his wife as to the payment of premiums operated to prevent the deceased from changing the apportionment.

In the Divisional Court, Clute, J., delivered a judgment upon practically similar lines, agreeing with Middleton, J.; and Meredith, C.J., in a brief judgment, said that he agreed with Clute, J., that the transaction was one which, under the circumstances, could not stand, but declined to express an opinion upon the effect of the agreement as to the payment of premiums made between the deceased and his wife. Teetzel, J., agreed in the result. If the plaintiffs' case rested solely upon the agreement said to have been made between the deceased and his wife, I would have had some difficulty in following the conclusion of Middleton, J. I even doubt whether, upon the whole evidence, an actual binding agreement was ever made. The impression which I gather from the evidence is, that the deceased, finding himself unable to continue to pay, simply turned the matter over to his wife, advising her that it would be to the advantage of the family to keep up the payments. This, which is, I think, something less than a binding agreement, would explain the application subsequently made by the plaintiff Jane Clark to the defendant, to assist in keeping up such payments, and possibly also the fact that the plaintiff Jane Clark latterly did not keep them up. Nor, with deference, am I able to agree that the case can be properly dealt with upon the footing of a testamentary disposition procured by the defendant, so as to admit of the application of the rule as to evidence in the case of wills to which Middleton, J., refers.

The substantial issue between the parties, it seems to me, arises upon the plaintiffs' allegation of fraud and undue influence on the part of the defendant in obtaining from the deceased the execution of the document in question. And upon that issue, which is alone quite sufficient to dispose of the whole case, I would without hesitation find in favour of the plaintiffs.

The learned trial Judge found as a fact, upon conflicting evidence, that at the time of the transaction the deceased was of weak mind.

No consideration was paid or agreed to be paid by the de-

fendant for the transfer. She knew her father's condition and circumstances, and also that the policy had been kept alive by the plaintiffs, and must, therefore, have known that what, as she alleges, he proposed to do was at least unfair, and even dishonest, as against them. He came to the defendant, having left his own home without any sufficient cause; and steps were immediately taken, not to heal the breach, but to obtain the transfer now under attack. Under these circumstances, the defendant was, I think, bound to shew by satisfactory evidence, that the deceased thoroughly understood what he was doing, or at all events that he had been protected by independent advice: see *Phillips v. Mullings*, L.R. 7 Ch. 244, at p. 246; *McCaffrey v. McCaffrey*, 18 A.R. 599.

Middleton, J., who saw the witnesses, has expressed his dissatisfaction with the explanatory testimony adduced by the defendant concerning the transaction; and it is not even pretended that there was independent advice.

Under these circumstances, the transaction in question is one which, in my opinion, cannot be supported; and the appeal should be dismissed with costs.

*Appeal allowed; GARROW, J.A., dissenting.*

[IN THE COURT OF APPEAL.]

RE CITY OF TORONTO AND TORONTO R.W. CO.

*Street Railways—Interchange of Traffic—Ontario Railway Act, 1906, sec. 57 (6)—Application of—Order of Ontario Railway and Municipal Board—Jurisdiction—Municipal Corporation—Railways not yet Constructed.*

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An order made by the Ontario Railway and Municipal Board, determining, ordering, and declaring that sec. 57 of the Ontario Railway Act, 1906, should apply to the Toronto Railway Company and to the railways owned and operated by that company, and to the Corporation of the City of Toronto and the street railways to be constructed by that corporation, was *held* to be beyond the powers of the Board.

*Per Moss, C.J.O.*—The question turns upon the proper view to be taken of sub-sec. (6) of sec. 57, read in connection with and in the light of the other portions of the section. Under sub-sec. (4) the powers of the Board arise only when there has been inability to agree upon the matters there specified. And these powers are confined to determining in respect of these matters. Sub-section (6) enables the Board to deal with street railways, but does not say that it is to do so under circumstances different from those under which they deal with steam railways, by virtue of sub-sec. (4). There is no warrant for such a wide departure from the manifest object and scope of the section as to adapt it to a case where there are not two existing and operating lines before the Board, upon application made by one or more of the parties interested.



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*Per MEREDITH, J.A.*:—Reading the whole section together, and having due regard to the purpose of the Legislature, gathered from the whole Act, sub-sec. (6) applies only to interchange between existing street railways.

*Per MAGEE, J.A.*:—The word "company," as used in sec. 57, does not include a municipality; and a municipality is not liable under sec. 57 to be compelled to interchange traffic with any street railway or other railway company; and, therefore, that part of the order of the Board which dealt with the city corporation and the railways to be constructed by that corporation, was not within the powers of the Board. The order with respect to the company's railways would, if it stood alone, be quite within the powers of the Board; yet, being made upon a non-existent basis, and with a view to an impossible result, and made without consideration of its effect upon the company with regard to any other railway or street railway, it was not warranted in law and should be declared invalid.

By an order made by the Court of Appeal on the 17th November, 1911, the Toronto Railway Company were allowed to appeal to that Court from an order made by the Ontario Railway and Municipal Board on the 24th June, 1911.

The order of the Board was made upon the application of the Corporation of the City of Toronto, which application was as follows:—

"The applicant hereby makes application for an order of the Ontario Railway and Municipal Board, directing and ordering the respondent to afford all proper and reasonable facilities for the receiving and forwarding of passenger traffic upon and from the several railways belonging to the respondent, and those to be constructed by the applicant upon St. Clair avenue and Gerrard street, in the city of Toronto; and providing for the return of cars, motors, and other equipment belonging to either the applicant or the respondent, and used for the purpose of receiving or forwarding such traffic, so as to afford all passengers on the cars of the municipal system passage over the tracks of the respondent company as a continuous line of communication without unreasonable delay and without prejudice or disadvantage in any respect whatsoever, and so that no obstruction may be offered in the use of the Toronto Railway system and lines to be laid by the applicant as a continuous line of communication, and so that all reasonable accommodation may at all times be mutually afforded by and to the said applicant and the said respondent.

"And for an order that the respondent company and its railway system shall be subject to and governed by the provisions of sec. 57 of the Ontario Railway Act, 1906."



The order made by the Board was as follows:—

“1. This Board determines, orders, and declares that section 57 of the Ontario Railway Act, 1906, shall apply to the Toronto Railway Company and the street railways owned and operated by the said company.

“2. This Board further determines, orders, and declares that section 57 of the Ontario Railway Act, 1906, shall apply to the Corporation of the City of Toronto and the street railways to be constructed by it.”

Section 57 of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30, is as follows:—

57.—(1) The directors of any railway company may at any time, and from time to time, make and enter into any agreement or arrangement with any other company, either in this Province or elsewhere, for the regulation and interchange of traffic passing to and from the railways of the said companies, and for the working of the traffic over the said railways respectively, or for either of those objects separately, and for the division and appointment of tolls, rates and charges in respect of such traffic, and generally in relation to the management and working of the railways, or any of them, or any part thereof, and of any railway in connection therewith, for any term not exceeding twenty-one years, and to provide, either by proxy or otherwise, for the appointment of a joint committee or committees for the better carrying into effect such agreement or arrangement, with such powers and functions as may be considered necessary or expedient, subject to the consent of two-thirds of the shareholders, voting in person or by proxy.

(2) Every railway company shall, according to their respective powers, afford all reasonable facilities to any other railway company for the receiving and forwarding and delivering of traffic upon and from the several railways belonging to or worked by such companies respectively, and for the return of carriages, trucks, and other vehicles; and no such company shall give or continue any preference or advantage to or in favour of any particular company, or any particular description of traffic, in any respect whatsoever, nor shall such company subject any particular company or any particular description of traffic to any prejudice or disadvantage in any respect whatsoever; and every

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railway company having or working a railway which forms part of a continuous line of railway, or which intersects any other railway or which has a terminus, station or wharf of the one near a terminus, station or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding by the one of such railways, all the traffic arriving by the other, without any unreasonable delay and without any such preference or advantage, or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered in the using of such railway as a continuous line of communication, and so that all reasonable accommodation may at all times, by the means aforesaid, be mutually afforded by and to the said several railway companies.

(3) If any officer, servant or agent of a railway company, having the superintendence of the traffic at any station or depot thereof, refuses or neglects to receive, convey or deliver at any station or depot of the company for which they may be destined, any passenger, goods or things, brought, conveyed or delivered to him or to such company, for conveyance over or along the railway from that of any other company, intersecting or coming near to such first-mentioned railway, or in any way wilfully contravenes the provisions of the next preceding sub-section—such first-mentioned railway company, or such officer, servant or agent, personally, shall, for every such neglect or refusal, incur a penalty not exceeding \$50 over and above the actual damages sustained.

(4) In case any company or municipality interested is unable to agree as to the regulation and interchange of traffic or in respect of any other matter in this section provided for, the same shall be determined by the Board.

(5) All complaints made under this section shall be heard and determined by the Board.

(6) This section shall apply to such street railways as may from time to time be determined by the Board.

January 22. The appeal was heard by Moss, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, J.J.A.

*H. S. Osler*, K.C., for the appellants, argued that the Board had no power under sec. 57 (6) of the Ontario Railway Act to make the order in question. The language of the Act could only refer to railways in existence, and was not intended to enable

a corporation desirous of building a railway to ascertain in advance the terms upon which it could interchange traffic with an existing railway. The statute shews that the Board must have all the facts before it before making such an order, and the necessary evidence has not been obtained in the present case.

*H. L. Drayton*, K.C., and *G. A. Urquhart*, for the respondents, argued that the question at issue was merely an academic one, as the city's railways would soon be finished. The jurisdiction of the Board to make the order appealed against is plain under sec. 57 (6) of the Act, and the appellants are not entitled to rely on the absence of evidence which they could have supplied at the hearing, if they had desired to do so.

*Osler*, in reply, argued that the question was not merely academic; and, even if it were, the statute should not be construed in the way suggested by the respondents, in the absence of clear and specific words to the effect contended for.

April 15. Moss, C.J.O.:—In the view which I take of the question raised by this appeal, it is not necessary to discuss or consider at length many of the arguments which were forcibly presented against and in support of the order appealed from.

As a practical operative order, it works no substantial advantage to the city and it imposes no real disadvantage upon the company. It settles nothing of a practical nature, and, as a declaratory order, does nothing towards making effective the provisions of sec. 57 of the Ontario Railway Act, 6 Edw. VII. ch. 30, as between the parties hereto.

Whether, if the Board had the power to issue the order, it rightly exercised it, is a question with which we have no concern. It is right to assume that, when its power to determine is invoked, the Board will not undertake to determine without having first informed itself of all the existing conditions, and considered whether the circumstances shewn make it just and proper to put the provisions of the section into effect as between the street railways then before it.

The question of power turns, as it appears to me, upon the proper view to be taken of sub-sec. (6) of sec. 57 of the Railway Act, read, of course, in connection with and in the light of the other portions of the section.

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I am unable to satisfy myself that in this case the circumstances had arisen which, upon a careful study of the section, I think must occur before the power under sub-sec. (6) is called into action.

It is, of course, undeniable that primarily the provisions of the section deal only with steam railways, and are intended to govern the regulation and interchange of traffic between transportation agencies of that character. And it is also quite plain that the legislation contemplates existing operating companies actually engaged in carrying traffic, which includes, no doubt, passengers, as well as goods. Thus sub-sec. (1), providing for agreements between companies speaks of "traffic passing to and from the railways of the said companies," of "the working of the traffic over the said railways," of "the division and apportionment of tolls, rates and charges in respect of such traffic," and of "the appointment of a joint committee or committees for the better carrying into effect such agreement." So, too, sub-sec. (2), imposing upon a company an obligation to afford facilities to other companies, speaks of "the receiving and forwarding and delivering of traffic," of "the return of carriages, trucks, and other vehicles," of a company "having or working a railway which forms part of a continuous line of railway, or which intersects any other railway," of the duty of such a company to "afford all due and reasonable facilities for receiving and forwarding by the one of such railways, all the traffic arriving by the other." Again, sub-sec. (3), dealing with penalties, speaks of refusal or neglect "to receive, convey or deliver at any station or depot of the company for which they may be destined, any passenger, goods or things, brought, conveyed or delivered . . . for conveyance over or along the railway from that of any other company, intersecting or coming near to such first-mentioned railway."

All these point plainly and unmistakably, not to projected or contemplated railways, but to railways actively engaged in the business of conveying passengers and goods upon and over their lines. It is only when they are found in that condition that they can be usefully rendered available for carrying out the objects aimed at.

Sub-section (4) brings the Board into requisition where there



is a failure or inability to agree as to the regulation and interchange of traffic or any other of the matters provided for, and empowers it to determine upon an agreement according to the terms of which the mutual services prescribed by the previous portions of the section shall be performed by the parties interested.

But, before the Board's powers can come into play, it must find, and be prepared to deal with, a case of (a) at least two existing operating companies engaged in receiving, forwarding, and delivering traffic with railways forming parts of a continuous line or intersecting each other or having termini, stations, or wharves near to each other; in fine, operating and carrying on the business of transportation of passengers or freight or both under the circumstances detailed in the preceding portion of the section; and (b) inability to agree as to the regulation and interchange of traffic or in respect to the other matters provided for.

Now, is there anything in sub-sec. (6) to shew that in the case of street railways there is to be any different mode of treating the matter?

It says "this section," that is, the preceding provisions of the section, "shall apply to such street railways as may from time to time be determined by the Board." Is it intended by this enactment to do more than to apply the provisions of the section to street railways which the Board shall find holding towards each other, relatively at least, the same position as steam railways? That it was not so intended seems to be manifest from the language. Under sub-sec. (4) the powers of the Board arise only when there has been inability to agree upon the matters there specified. And these powers are confined to determining in respect of these matters. Sub-section (6) enables the Board to deal with street railways, but does not say that it is to do so under circumstances different from those under which they deal with steam railways, by virtue of sub-sec. (4). In other words, the Board, when it finds two or more existing operating street railways before it, upon application made by one or more of the parties interested, is to determine whether, as regards the street railways before it, there is a case proper for intervention under sub-sec. (4). It may be that the Board should have regard, upon such an application, to the differences in methods of transport and the conduct of business between the two systems; but

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there does not appear to be any warrant for such a wide departure from the manifest object and scope of the section as to adapt it to a case where there are not two existing and operating lines before the Board upon the application.

The application is intended to result in something practical in the form of an order determining the terms and conditions upon which the regulation or interchange of traffic is to take place. There is no indication anywhere that the Board is to deal with any but a state of circumstances outlined in sub-sec. (4).

For these reasons, I think that, under the then existing circumstances, the order made was not within the scope of the Board's powers under sec. 57, and that it should not stand.

The appeal should be allowed, with the usual result as to costs.

GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A.:—The main part of the respondents' application to the Board makes manifest its premature character; it is in these words:—

“The applicant hereby makes application for an order of the Ontario Railway and Municipal Board, directing and ordering the respondent to afford all proper and reasonable facilities for the receiving and forwarding of passenger traffic upon and from the several railways belonging to the respondent, and those to be constructed by the applicant upon St. Clair avenue and Gerrard street, in the city of Toronto; and providing for the return of cars, motors, and other equipment belonging to either the applicant or the respondent, and used for the purpose of receiving or forwarding such traffic, so as to afford all passengers on the cars of the municipal system passage over the tracks of the respondent company as a continuous line of communication without unreasonable delay and without prejudice or disadvantage in any respect whatsoever, and so that no obstruction may be offered in the use of the Toronto Railway system and lines to be laid by the applicant as a continuous line of communication, and so that all reasonable accommodation may at all times be mutually afforded by and to the said applicant and the said respondent.”

To an ordinary mind it must seem extraordinary, at the least, for any one to apply for an interchange of passenger traffic, cars, motors, and other equipment, not only without having any to interchange, but without having even a railway to run them over; indeed, so extraordinary that, although the Board was plainly anxious to aid the applicant all it could, this part of the application is not even adverted to in the formal order made by it upon the application.

The earlier provisions of the enactment in question—the Railway Act, sec. 57—make it clear to me, upon their face, that they relate only to existing railways. The agreement which railway companies may make is for the “interchange of traffic passing to and from the railways” of such companies: evidently existing railways capable of actually making such an interchange; and in practice almost necessarily so. Then every railway company is to afford reasonable facilities to any other railway company for receiving, forwarding, and delivering traffic upon and from the several railways belonging to or worked by such railway companies respectively; again, existing railways, of course. And then a penalty is provided for refusal or neglect to forward traffic over, necessarily, an existing railway.

All this seems to be so plain, and so, for practical purposes, necessary, that there was little, if any, controversy over it: but it was urged, for the respondents, that, under sub-sec. (6) of sec. 57, the Board had power to determine that that section should apply to the appellants’ railway: Mr. Drayton seemed to take refuge in this last ditch; but, for several reasons, in my opinion, he cannot hold it: in the first place, the order in question was not made upon the Board’s own motion, but was based entirely upon the respondents’ application, upon which they can take nothing and which they had no power to make; and, therefore, the order was made without jurisdiction: in the second place, the Board had no intention to make, and did not make, any such order; its order was intended to embrace, and does in terms embrace, both parties to the application and the railway of the one and the proposed railway of the other: to strike out that part of the order which relates to the respondents, and their proposed railway, and to let the rest stand, would be to make a new, and different, order, of a very different character and

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effect, from that intended to be made, and actually made, by the Board; and one which, I can hardly think, they would have thought of making; and which, if they had made it, could not, in my opinion, stand. The purpose of the Board was to make provision so that there should be an interchange of traffic between the railway of the appellants and that of the respondents, when it comes into existence; and that alone was the purpose of the application to them by the respondents. Take away the order against the respondents, and what remains is something never contemplated by the parties or the Board, and which, I should imagine, no one desires. It would give the prospective railway of the respondents nothing: they would be obliged to apply again to the Board when they have a real railway, not merely power to build it; whilst the effect upon the appellants and their railway would be this, that they would be bound to interchange traffic, including carriage trucks and other vehicles, with every "steam" railway under the legislative power of the Legislative Assembly; and also with any other street railway, municipal or otherwise, which the Board might see fit to bring into the provisions of sec. 57, or which is already within them, under sub-sec. (6); that is, of course, if the Board's power be as wide under that sub-section as the respondents contend for; but, lastly, its power under that sub-section is, in my opinion, much narrower than that, and does not extend to the making of an unlimited order of that character. Reading the whole section together, and having due regard to the purpose of the Legislature, gathered from the whole Act, sub-sec. (6) applies only to interchange between existing street railways: it does not authorise the making of an omnibus order against any street railway company, putting upon it an obligation to interchange with every sort of a railway under provincial legislative power, with the limitation only that, as to other street railways, an omnibus order shall be made respecting them. The very nature of the thing seems to me to require that the order shall be limited to two or more definite existing railways, to be made only after a consideration of the particular case in the public interests, as well as of the interests of the companies directly concerned. The respondents cannot want—indeed, it would be obviously against their interests to want—the appellants' railway thrown



open to others and not to them: their need is, interchange between their railway when built and that of the appellants, but only if that can be beneficially accomplished; and they ought not, merely to save themselves from the position of having failed altogether in their application, to catch at and try to hold on to something that does them no good, but harm, as well as grievously and needlessly hampering the appellants' already overloaded railway. It is quite true that the applicants ought not to be delayed until the last spike of their construction is driven; but, on the other hand, it is at least equally plain that they ought not to begin their application before the first spike is driven; it can hardly be that even the first spike constitutes a "railway." The pitiful picture painted by the Chairman, of waste in the duplicating of works, is almost, if not altogether, a fanciful one only; and one which, if there really could be anything in it, would not be got rid of, or even ameliorated, by the order in question, which gives nothing to the respondents; until the final agreement, or order, for interchange, should be made, there would be just as much uncertainty as there is now; an uncertainty which cannot really affect materially, if in any way, the mode of construction of the proposed railway.

A much more real picture of that character might be drawn from a study of the effect of an unlimited order adding to the burden of already overcrowded cars, and overburdened rails, complaint, inconvenience, and bad feeling, as well as to the danger to life and limb which that burden already carries.

There is obviously a vast difference, in this respect, between "steam" railways and street railways; to the former, with their comparatively infrequent trains and the matter of merely attaching other cars to them, the freest interchange is, generally speaking, manifestly in the public interests, as well as in the interests of all else concerned; between street railways, with already overcrowded rails, as well as cars, cars which are run separately, and when it may be practically necessary to send not only the car but also the crews of the one company over the lines of the others, a very different, and a much more difficult, problem arises, and one which can be fairly dealt with only when the railways are in existence and after the most careful consideration of all the then existing circumstances—circumstances which are changing,

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in some respects, from time to time, and with especial regard to lessening rather than running any risk of increasing the already terrible toll of lost life and limb in street railway accidents.

I can have no manner of doubt that, if the position of the parties were reversed, if the municipality were the owners and operators of the central system, and some private corporation were projecting the outlying railway, this particular application would be generally scoffed at.

I am in favour of allowing the appeal, and discharging the order in question altogether.

MAGEE, J.A.:—The by-law and orders of the Ontario Railway and Municipal Board under which the City of Toronto Corporation is acting were not before us on the argument, but were before that Board, or at least within its cognizance upon the city corporation's application for the order now in appeal. A copy of by-law No. 5626, which will be referred to, has since been put in, and also a copy of the opinion of the Board, dated the 23rd June, 1911, approving of the plans and profiles submitted by the city as to car lines on Gerrard street and Coxwell avenue and on St. Clair avenue.

The appellants, the Toronto Railway Company, own and operate the street railway within what was formerly the city of Toronto, but new territory has since been added to the city, and the proposed street railways of the city or some of them are to be within the new territory.

As a municipal corporation, the city would be enabled under sec. 569 of the Consolidated Municipal Act, 1903 (as amended in 1906 by 6 Edw. VII. ch. 34, sec. 21, and in 1910 by 10 Edw. VII. ch. 81, sec. 4), to pass, with the assent of the electors, a by-law for building, equipping, maintaining, and operating street railways along such streets and subject to and upon such terms as the Lieutenant-Governor in Council might approve, and for leasing the same from time to time, and for levying an annual special rate to defray the interest and principal of the expenditure. No other statutory authority is referred to as empowering the city to construct or operate a street railway. By the Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII. ch. 31, sec. 53, that Board is given the powers of the Lieutenant-Governor

in Council as to approval or confirmation of such by-laws. By the Ontario Railway Amendment Act, 1910 (10 Edw. VII. ch. 81, sec. 3), a railway company shall not, without first obtaining the permission of the Board, begin the construction of a railway upon a highway, and this shall apply to a street railway; and by the Ontario Railway Act, 1906 (6 Edw. VII. ch. 30), sec. 2 (21), a "street railway" is declared to mean a railway constructed or operated along a highway under or by virtue of an agreement with or by-law of a city or town. Thus the Board's approval of the by-law (or that of the Lieutenant-Governor in Council) would be necessary, and also the Board's permission, before beginning the construction on the streets.

A by-law was passed by the city council with a view to the construction of some street railway lines. In the Board's reasons for the order, of the 24th June, 1911, now in appeal, it is stated that "the city submitted a by-law to the ratepayers to authorise the issue of debentures to the amount of \$1,157,293, to pay for the construction and equipment of street railways upon certain streets to be selected by the council, with the approval of this Board. The by-law was carried by an overwhelming majority." The Board then goes on to state: "On the 25th April last, the city made an application to the Board for the approval of the plans for the construction of the civic car lines on Gerrard street and Coxwell avenue from Greenwood avenue to Main street, and on St. Clair avenue from Yonge street to the Grand Trunk Railway crossing. The Board, in an opinion dated the 6th May, 1911, declined to approve the plans and profiles until the city furnished us with particulars of the whole scheme for building, equipping, maintaining, and operating the civic car lines. We stated in that opinion that we required to know all the streets the city intended to use for the lines, the mileage, the kind of rail, the character of the construction, kind of car barns and repair shops, the number and kind of cars to be operated, and an estimate of the cost of construction, operation, and maintenance, and of the revenue to be derived from the enterprise. The city have complied with this demand of the Board, and have furnished us with the required particulars and details of the scheme. The Board have approved of the plans and profiles and of the scheme generally. We are informed that the

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city have ordered the rails and other material necessary for the construction of the lines."

We find in the statutes of 1911 (1 Geo. V. ch. 119, sec. 8) that a city by-law No. 5626, passed on the 23rd January, 1911, for the raising of \$1,157,293, the amount mentioned by the Board, was declared valid.

In the letter of the 5th May, 1911, to the company's manager, counsel for the city stated: "As you know, the different routes under contemplation by the city, and for which the by-law has been passed by the people, are as follows: (1) St. Clair avenue . . . (2) Davenport road and Bathurst street . . . (3) Rosedale loop . . . (4) Danforth avenue . . . (5) Gerrard and Main street. . . ." The letter goes on to state the estimated cost of constructing a double track with an 80 lb. rail on each of these routes.

So far as appears, by-law No. 5626 is the only by-law passed. It recites that by a report of the board of control, adopted in council, "it is recommended that a by-law should be passed to provide for the issue of debentures to the amount of \$1,157,293 for the purpose of building and equipping street railways, and of laying permanent pavements upon the railway portions upon certain streets of the city;" and that the council had determined to issue debentures to that amount, "for the purpose of raising the amount required to pay for the construction and equipment of street railways upon certain streets to be selected by the council, with the approval of the Ontario Railway and Municipal Board, in those parts of the city annexed thereto since September, 1891, and for the laying down of permanent pavements upon the railway portions of such streets." The by-law then authorised the issue and sale of the debentures, "and the proceeds thereof . . . shall be applied for the purposes above specified, and for no other purpose."

It would thus appear that the by-law does not specify any street for the railway, but leaves that to future selection by the council. The issue of debentures is made valid by the statute, and no objection is taken here as to the validity or sufficiency of the by-law otherwise, or to the right of the city to proceed with the construction and operation of the proposed lines. Objection is made, however, that the mere right to construct, and even an authorised plan for construction, does not suffice for the application now in question.



On the 5th June, 1911, the city gave the company notice of the application out of which this appeal arises, and the application was heard on the 21st June. No evidence was offered beyond putting in some letters which had passed between the parties, each inviting proposals from the other.

The permission of the Board for the construction had not been given when the application was heard. The information which the Board had required was received by it only on the previous day, the 20th June, and the company's counsel was not aware that it had been furnished. The Board's approval is dated the 23rd June. The order appealed from, though not dated, is stated to have been made on the 24th June.

The city notified the company of its intention to apply to the Board for two things: an order to the company to afford all proper facilities for what may be called interchange of passenger traffic and cars between the company's street railway and two of the city's lines, namely, those on St. Clair avenue and Gerrard street; and an order that the company and their railway system shall be subject to and governed by the provisions of sec. 57 of the Ontario Railway Act, 1906. The Board did not grant the application for an order for interchange. It was hardly asked for, but recognised as premature, and indeed asserted by the city to be a matter for subsequent action. But the Board did make an order declaring that sec. 57 should apply to the company and its street railways, and also declaring that it should apply to the city corporation "and the street railways to be constructed by it." The latter declaration had not been specifically asked for.

The company appeal, on the ground that the Board had no jurisdiction to make such an order against them, at the instance of the city, or with a view to interchange with the non-existent city railways.

The Ontario Railway Act, 1906 (6 Edw. VII. ch. 30), in sec. 3, incorporates the Act with the special Act, and declares that it applies to "all persons, companies, railways (other than Government railways) and (when so expressed) to street railways within the legislative authority of the Legislature of Ontario;" but no section of the Act shall "apply to street railways unless it is so expressed and provided." Section 5 is to the like effect.

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Section 57, in sub-sec. (1), provides that "the directors of any railway company may at any time, and from time to time, make and enter into any agreement or arrangement with any other company, either in this Province or elsewhere, for the regulation and interchange of traffic passing to and from the railways of the said companies, and for the working of the traffic over the said railways respectively, or for either of those objects . . . for any term not exceeding twenty-one years," and to "provide . . . for the appointment of a joint committee or committees for the better carrying into effect such agreement or arrangement . . . subject to the consent of two-thirds of the shareholders, voting in person or by proxy." Sub-section (2) provides that "every railway company shall . . . afford all reasonable facilities to any other railway company for the receiving and forwarding and delivering of traffic upon and from the several railways belonging to or worked by such companies respectively, and for the return of carriages, trucks, and other vehicles;" and no such company is to give any preference or advantage to any particular company or description of traffic, or subject any to prejudice or disadvantage; and "every railway company having or working a railway which forms part of a continuous line of railway, or which intersects any other railway or which has a terminus, station or wharf of the one near a terminus, station or wharf of the other," shall afford facilities for receiving and forwarding by the one all the traffic arriving by the other and so that no obstruction may be offered "in the using of such railway as a continuous line of communication." Sub-section (3) imposes penalties on the employees of a "railway company" refusing or neglecting to receive, convey, or deliver traffic from the railway of "any other company." Sub-section (4) declares that "in case any company or municipality interested is unable to agree as to the regulation and interchange of traffic or in respect of any other matter in this section provided for, the same shall be determined by the Board." And sub-sec. (5) reads: "All complaints made under this section shall be heard and determined by the Board." If the section stopped there, it would not apply to street railways. But sub-sec. (6) is added, which declares that "this section shall apply to such street railways as may from time to time be determined by the Board."

The word "company," in the expressions "any railway company," "every railway company," and "any other railway company," used in sec. 57, is not, I think, governed by the interpretation given in sec. 2 to the expression "the company," and should, therefore, be interpreted in its natural sense, and would not include a municipal corporation. And, as only companies are mentioned, it could not be intended that municipalities or their railways could be made subject to it. But then, it may be said, that, under sec. 569 of the Municipal Act, the municipality has the same rights, powers, and liabilities as street railways and companies (which must mean all, not some, of such railways and companies) under the Street Railway Act (R.S.O. 1897, ch. 208), which is now replaced and repealed by the Ontario Railway Act, 1906. By the Interpretation Act, R.S.O. 1897, ch. 1, sec. 8 (now 7 Edw. VII. ch. 2, sec. 7), the sections of the Ontario Railway Act, 1906, corresponding to those of the Street Railway Act, would be applicable. In the Street Railway Act and the amendments before 1906, there was no provision requiring interchange, though there was a right to agree to interchange. Section 57, apart from sub-sec. (6), does not relate to street railways at all, and even with sub-sec. (6) does not relate to all but only to some street railways—perhaps to none in the Province other than these two. It cannot then be said that sec. 569 makes interchange a right or liability of the municipality. The only view in which it might be claimed that the municipality would be made subject to sec. 57 is, that it is subject to the jurisdiction of the Board, and liable to have an order made by the Board under that section—but that is not, I think, in any sense, one of the "liabilities" contemplated by sec. 569. I am, therefore, of opinion that a municipality is not liable under sec. 57, any more than a Government railway, to be compelled to interchange traffic with any street railway or other railway company. I may here add that the use of the word "municipality" in sub-sec. (4) does not help a contrary view; it is manifestly used in respect of rights other than as proprietors of a railway, and its use there, as contradistinguished from "company," when it is not used elsewhere in the section, rather supports the view that "company" does not include "municipality."

It is noticeable that sub-sec. (6) of sec. 57 uses the words "street

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railways." "Street railway" is defined in sec. 2 (21) as meaning a railway "constructed or operated" along a highway, as already mentioned. Had sub-sec. (6) used the words "the company," they are defined as meaning "the company or person" (which would, under the Interpretation Act, include "corporation") "authorised by the special Act to construct." The city's street railway is authorised, but it is not yet commenced, much less constructed or operated. But, as the interchange of traffic could not take place till constructed and operated, I do not see that the Board must wait until that stage before making the declaration that sec. 57 shall apply to it, when constructed and operated. As pithily put by the Board, "that the proposed civic lines will be built is as certain as taxes." The Board do not make such a declaration in the dark. As appears from the quotation above made from their reasons, they know the routes and the gauge, and sufficient particulars to enable them to judge whether it is proper that a particular street railway should be made liable to interchange at all. The Legislature has constituted the Board for the very purpose of exercising its discretion, and it is not to be assumed that the Board would in any case act in the dark or without full information on all points necessary for arriving at a decision. The liability to interchange is one thing, the terms of the interchange another.

I have been dealing with the question of the power of the Board to determine that the city or its street railway shall be subject to sec. 57. That it has such power with regard to the street railway of the appellant company is not disputed. That power it may exercise of its own motion or on the application of any one interested, and, under sec. 17 of the Ontario Railway and Municipal Board Act, it can decide conclusively who is a party interested; and I do not see anything in the Act to prevent the city corporation, owning or not owning a street railway, or a Board of Trade, or a body of merchants, or an individual, from being considered by the Board to be a party interested sufficiently to set the Board in motion if the Board did not choose to take action itself.

We then come to consider the order appealed from. It is in fact two orders combined in one. It is not an order that sec. 57 shall apply as between these two street railways, or shall



apply to each as regards the other. It contains an absolute and unlimited declaration that the section shall apply to the company and its street railway. And then it contains an equally absolute and unlimited declaration as to the city and the "street railways to be constructed by it." It is not restricted to those coterminous with the company's railway nor to those on St. Clair avenue and Gerrard street, nor even to those to be constructed under the existing by-law; but this appeal has no concern with any objection on that score. The effect is that, if sec. 57 is to apply to the company, it applies to it not merely to require interchange with the city's street railway, but with all street railways, if not all railways of any sort to which sec. 57 from time to time applies.

That brings us again to consider sub-sec. 6. Several meanings may be put forward for it. One is that the Board may apply sec. 57 not to one or more specified street railways, but to a class or to such as answer certain requirements. This order would not comply with that interpretation. Another meaning might be argued for—that the Board could apply sec. 57 not to any one or more certain specified street railways, but only as between two or more specified street railways—so that, in fact, it would not wholly apply to any one of them—that is, it would not apply to it as regards railways not mentioned. This order does not comply with that meaning.

Then the only remaining construction, and the one which is, in my opinion, the correct one, is, that the Board may do what, if we could judge only by the formal order, it has done here, that is, decide whether or not sec. 57 shall apply to a particular railway, whatever the result may be.

If the Board chooses to do that with regard to the street railway of the appellant company, or any other company to which the Ontario Railway Act applies, I do not see anything to prevent it. What the effect upon that company may be is another question. Does it become liable to interchange with all railways which are subject to sec. 57, or only with street railways? The section is to be construed not merely with reference to Toronto alone, but with reference to the whole Province. There might well be places in which a street railway would be the only connecting link between two lines of steam railways,

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and in which it might be constructed with a view to being a connecting link, as street railways are not limited to carriage of passengers, and street railways continue to be street railways for a mile and a half outside the city or town. It might be to the public interest that such a street railway should be both entitled and liable to interchange with lines of steam railway.

In my opinion, the Board cannot limit the application of sec. 57, if it declares that that section applies to the appellant street railway or any other. It cannot say how far that section shall apply, or that it shall apply only to a limited extent, or with regard to one railway or one street railway.

If two companies to which the section applies are subsequently unable to agree, and the intervention of the Board becomes necessary, it may find interchange impracticable, and decline to make an order between them, or may have to require conditions which would not be acceptable to an applicant. But that is a different matter from assuming to exercise, under sub-sec. (6), the right to limit the application of the section.

Although the order appealed from, in form, purports to be separate applications of sec. 57 to each of these street railways, it is not stated just what view the members of the Board took of the meaning of the sub-section. But in their reasons they in every instance couple the two roads together. For instance, it is stated: "The application is made by the city against the Toronto Railway Company for the purpose of securing an interchange of traffic between the civic car lines and the company's street railway system, and with that view to have it declared that sec. 57 of the Ontario Railway Act of 1906 applies to the company and the city street railway . . . We do not think we require to wait until the last spike is driven before determining that sec. 57 . . . shall apply to the city's and the company's street railways. To do so would result in useless and wasteful duplication . . . There should be an interchange of traffic; and, therefore, we make the determination asked for by the city." The Board also expressed its opinion that it would be in the public interest, when the city had completed and equipped the railway, to arrange for its operation with the present street railway as one system. Nowhere does

the Board deal with the propriety of making sec. 57 applicable to any one road alone.

It is, I think, evident that, although the city had only asked for the application of sec. 57 to the company's street railway, the Board was not considering the application of the section to either railway apart from the other—and was making the declaration only with respect to the company's railway, because it was also making a similar declaration with regard to the city's railway. The reasons of the Board for its decision are signed by all the members, and are before this Court, and it is evident that, if the city was not to be liable to interchange, no order would have been made in respect of the company alone, and that the order was only made for the purpose of interchange between these two railways. Taking, as I do, the view that the Board could not apply sec. 57 to the city railways, it follows, I think, that, although the order with respect to the company's railways would, if it stood alone, be quite within the powers of the Board, yet, being made upon a non-existent basis, and with a view to an impossible result, and made without consideration of its effect upon the company with regard to any other railway or street railway, it was not warranted in law and should be declared invalid.

Whether, in view of the provisions of sec. 21 of the Ontario Railway and Municipal Board Act, 1906 (6 Edw. VII. ch. 31), restricting the Board's power to interfere with a company's rights or duties under an agreement, any practical beneficial result would be attained by the application of sec. 57 of the Ontario Railway Act, may give rise to serious consideration. The Board have a very desirable end in view, and it is to be hoped that the good sense and public spirit of both parties will lead them to it.

*Appeal allowed.*

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LIVINGSTON V. LIVINGSTON.

April 16     *Partnership—Account—Profits of Separate Business Carried on by one Partner—Assent of other Partner—"Competing" Business—Sale of Property of Firm after Death of one Partner—Purchase by Trustee for Surviving Partner—Adequacy of Price—Liability to Account for Profits on Resale—Allowance to Surviving Partner for Services in Liquidation—Trustee Act, sec. 40—Trustee—Express Trustee.*

One of two members of a partnership carrying on business in Ontario was interested as a partner in a similar business carried on in Michigan:—

*Held*, that the irresistible inference from the facts in evidence was, that what was done by the one partner was done with the assent and approval of the other; and, therefore, the rule of law laid down by Lindley, L.J., in *Aas v. Benham*, [1891] 2 Ch. 244, 255, "that if a partner without the consent of his copartners carries on a business of the same nature as, and competing with, that of the firm, he must account for and pay over to the firm all profits made by him in that business," had no application.

*Quære*, whether the Michigan business was a "competing" business, within the meaning of the rule.

*Held*, also, that the finding of a Referee upon a reference for the taking of the accounts of the partnership, after the death of one of the partners, that the sale of an oil mill owned by the firm to a brother-in-law of the defendant (the surviving partner), was provident, and the price realised was as much as the mill was worth, was well warranted by the evidence.

*Held*, also, upon the evidence, affirming the finding of the Referee, that the surviving partner was, in truth, the purchaser, and that his brother-in-law was a mere trustee for him.

*Held*, however, in this reversing the conclusion of the Referee, that the defendant was not liable to account for profits realised when the oil mill was afterwards sold with the other assets of a company formed to carry on an oil business, to which the mill was turned over; he was liable to account for the real value of the property which he had improperly purchased; but that was the extent of his liability; and the finding that the property sold for its full value was conclusive.

*Held*, also, reversing the finding of the Referee, that the defendant was not entitled to an allowance for his services in connection with the liquidation of the partnership.

Section 40 of the Trustee Act, R.S.O. 1897, ch. 129, applies only to express trustees; and, *semble*, a surviving partner is not a trustee at all.

AN appeal by the defendant and a cross-appeal by the plaintiffs from the report of George Kappel, K.C., an Official Referee, dated the 7th December, 1910, upon a reference for taking the accounts of a partnership which formerly existed between John Livingston and James Livingston. John Livingston died in 1896; and this action was brought by his representatives against James.



March 15 and 18. The appeal and cross-appeal were heard by MIDDLETON, J., in the Weekly Court at Toronto.

*I. F. Hellmuth*, K.C., and *J. H. Moss*, K.C., for the defendant.

*Wallace Nesbitt*, K.C., and *H. S. Osler*, K.C., for the plaintiffs.

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April 16. MIDDLETON, J.:—The facts are fully set forth in the very elaborate and careful report of the learned Referee, and I do not need to set them forth at length. Three distinct matters were argued, and those require to be separately dealt with.

In 1856, the late John Livingston and James Livingston came to Canada—young men—without any capital, and throughout their lives worked together as partners. From very small beginnings their business prospered, until, at the death of John, the elder brother, in 1896, their joint property amounted to more than half a million dollars. During all this time, the brothers appear to have had perfect confidence in each other, and each seems to have accorded to the other the greatest liberty in respect to the assets of the firm. There do not appear to have been any of the restrictions that would usually have existed in the case of a partnership. Each brother was practically allowed to do as he pleased. If he wanted money, he took it, and it was charged to him. There was no fixed capital. Each brother took what he needed, and what was left was used for the purposes of the business.

In the course of time, new problems arose. Some members of the family were taken into the business. Ultimately, when McColl, a son-in-law of James, and Peter Livingston, a nephew, in 1887 desired to be taken into the business, James came to the conclusion that it was inadvisable to introduce into the concern any more relatives, and he told these young men to endeavour to establish a business for themselves in Michigan, and that he would assist them. It appears that John was asked to join in this, but declined. Finally an arrangement was come to between the two young men and James, by which they formed a partnership to operate at Yale, Michigan; and there is no doubt that James was the financial backer of this business. He desired to

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open a separate bank account for its financing; and, at the suggestion of the local bank manager, he opened a special account—"J. & J. Livingston Special." This was for the purpose of avoiding any discussion with the bank's head office.

This business was carried on in Michigan for nine years before John's death, and from small beginnings grew to be a very substantial affair. There was no secrecy in connection with it. It had many dealings with the firm of J. & J. Livingston; and, when the United States tariff was changed so as to make it unprofitable for certain branches to be carried on from Canada, some business formerly done by the Canadian firm appears to have been substantially transferred to the American firm.

Annual statements were prepared by the accountant, and were submitted to John Livingston. In none of these statements was the Michigan business treated as being an asset of the Canadian firm. No objection whatever was ever taken by John; in fact, from the beginning of the whole matter, each brother seems to have been entirely content to abide by the actions of the other.

After the death of John, those claiming under him appear to have felt themselves aggrieved by the dilatoriness of James in the winding-up of the partnership; and in 1901 an action for the dissolution of the partnership was brought. This action has dragged on to the present time.

In 1902, by consent, a judgment for a dissolution was pronounced, in the ordinary form, save for the reservation to James of the right to make a claim to be remunerated for his services in connection with the liquidation. When the accounts were brought in under this judgment by the defendant, a surcharge was filed, claiming, among other things, that this Yale business was an asset of the firm.

The other members of the Yale firm were not before the Court; yet both the Master to whom the matter was originally referred, and the learned Referee, have, in the absence of the other members, assumed to deal with the question of ownership. The learned Referee has found that the business is and always was a separate business, and that it was not owned by the partnership; and no appeal has been had from this decision.

The Referee has, however, found that the facts bring the case within the rule of law laid down by Lindley, L.J., in *Aas v. Benham*, [1891] 2 Ch. 244, 255: "It is clear law that every partner must account to the firm for every benefit derived by him without the consent of his co-partners from any transaction concerning the partnership or from any use by him of the partnership property, name or business connection. . . . It is equally clear that if a partner without the consent of his co-partners carries on a business of the same nature as, and competing with, that of the firm, he must account for and pay over to the firm all profits made by him in that business."

Upon that assumption, he has directed the defendant to bring into the partnership accounts all the profits received by him from the Yale business; and I understand this ruling to include not merely the profits which have actually been divided, but profits which have gone to increase the capital of that concern.

Upon the argument before me it was admitted that this was too wide, and that James's liability, if any, to account, must be taken to have terminated upon the dissolution of the Canadian firm by the death of his brother John.

With great respect for the learned Referee, and realising the advantage he had in hearing some portion of the evidence, I find myself unable to agree with him. I think the irresistible inference from the facts is, that what was done by James was done with the assent and approval of John; and that, therefore, the rule has no application.

The case in this aspect is singularly like *Kelly v. Kelly* (1911), 20 Man. L.R. 579, decided since the learned Referee's report.

Had I not come to this conclusion, I would have hesitated long before determining that this business was a competing business within the rule in question. When the business was established, the intention undoubtedly was to locate the young men far from home, where the business would not compete. They were to go to another country, and earn their own experience, and to establish an independent business for themselves; James became a partner in the Yale business for the purpose of remunerating him for his advice and counsel, and above all for his financial assistance. None of the cases upon competing business

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at all resemble this; and, when the relationship which existed between the brothers is borne in mind, it seems, to me at least, that the case is very far removed from the facts of the cases which have given rise to the rule.

Upon the argument, the Wurth-Hairst business was mentioned as forming the subject of a separate ground of appeal. This was not argued in detail, as I was told that my decision in connection with the Yale business would govern it.

The second ground of appeal is in connection with an oil mill owned by the firm. After the dissolution and after the parties were at arms' length and represented by separate solicitors, negotiations took place between James Livingston and the representatives of John for the purchase of this mill. James offered \$45,000. This was at first accepted, but the acceptance was withdrawn. The property was then offered for sale, and was purchased by one Erbach, brother-in-law of James, for \$38,500. This sale was attacked before the Referee as being a sale at an undervaluation; but the Referee found, upon the evidence, that the sale was provident, and the price realised was as much as the mill was worth. This finding is well warranted by the evidence. The valuation obtained on behalf of John's representatives, of something over \$48,000, was accompanied by the statement that no such price could be realised at a sale, but that it represented the actual value of the machinery as a running concern, and that the value placed on the buildings could not be realised, because, apart from the oil business—for which the buildings were adapted—they had no utility.

This sale was further attacked upon the ground that James Livingston was, in truth, himself the purchaser, and that Erbach was a mere trustee for him; and the Referee has so found. A company was incorporated shortly after the purchase, and the property was turned over to it; and this company has, in its turn, sold to the Dominion Oil Company. The whole transaction was financed upon James Livingston's credit; and neither the purchaser nor any of the shareholders of the company had ever put any money into the concern. I do not think it was open to the Referee to inquire into the title of the purchasers, in their absence. The company, although the creation of James Livingston, and in one sense almost identical with



him, was still a legal entity, and could not be deprived of its property in its absence; but James Livingston can be made to account, upon a proper basis if he has been guilty of any wrongdoing.

Upon the appeal before me it was argued that the Referee's finding of fact was not correct. No doubt, the finding is opposed to the oath of all those concerned; but actions frequently speak louder than words; and the conclusion appears to me irresistible that Livingston was, in truth, the purchaser.

I was urged to find that the correct inference from the evidence is, that Livingston was not the purchaser at the sale; that Erbach was not a trustee for him; but that, after the contract had ceased to be executory, Livingston had purchased from Erbach. The difficulty is, that there is no evidence to support this contention, and that it is quite opposed to what is stated by every one. It was suggested that to find otherwise would be to impute some improper conduct or some ignorance of the law to the late Mr. Barwick. It do not think it is necessary to do this. I think it extremely unlikely that Mr. Barwick knew the facts. Livingston, no doubt, was advised, and, no doubt, knew, that he could not buy directly or indirectly; but, nevertheless, I think that Erbach did buy for him; and everything that has taken place subsequently is consistent only with this view.

But I cannot at all agree with the consequences the Referee has attributed to this finding of fact. He says that the defendant must account to the estate for what was received by the James Livingston Linseed Oil Company when it went into the oil merger and transferred its property to the Dominion Linseed Oil Company.

I do not think that this is the result. Before the transaction was attacked, Erbach had conveyed the property to the James Livingston company. Its title has not been impeached. This transfer was at the same purchase-price, and merely involved the assumption of the liability to pay the \$38,500 to the estate; so there was then no profit. Nevertheless, Livingston would be liable to account for the real value of the property which he had improperly purchased; but it has been found that the property sold for its full value, and this finding has not been appealed from; and I think this ends his liability.

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The consequences of the Referee's findings appear to be most serious. The James Livingston Linseed Oil Company carried on business for years. The buildings and machinery formed a very small part of its real assets. It was, as a going concern, transferred—probably at a fictitious price—to the Dominion company; and it would be an extraordinary thing if the result should be that the estate should receive much more than the buildings and machinery were worth, and much more than these buildings and machinery cost or could be duplicated for. The question involved somewhat resembles that discussed in Lindley on Partnership, 7th ed., p. 634, concerning the liability of partners who carry on a partnership business, after their dissolution, and the profits made arise, not so much from the partnership assets which are used, as from the skill, industry, and ability of the surviving partners.

The question of the measure of damages of a trustee who becomes himself a purchaser is dealt with in the Divisional Court in the case of *Atkinson v. Casserley* (1910), 22 O.L.R. 527.

The third question is the propriety of the allowance made by the Referee to the defendant for his services in connection with the liquidation of the partnership. No doubt, the defendant has rendered great services to the partnership; and, as a matter of fairness and equity, his services ought to be remunerated; but I fear that the law is against his claim. In England it is well settled, though I have been unable to find any case indicating the precise ground upon which such a claim is disallowed. It may be because of the nature of the partnership contract; or it may be because in England trustees render their services gratuitously, unless it is otherwise expressly provided in the trust-deed. More probably there has never been any exact statement of the reason for the rule, because no English lawyer would think of placing the right of a surviving partner higher than the right of a trustee.

I can find no trace of any such allowance having been made in Ontario. The right, if it exists, must be based upon the Trustee Act. For convenience I refer to the Act in the revision of 1897, ch. 129, which in this respect is similar to the Act of 1887, which probably applies. The sections dealing with this matter are 40 *et seq.* Section 40 provides that "any trustee

under a deed, settlement or will . . . or any other trustee, howsoever the trust is created," shall be entitled to an allowance. These words, it seems to me, apply only to express trustees; and this impression is strengthened by reference to sec. 27, which provides that the expression "trustee," in the next five sections of the Act, includes "a trustee whose trust arises by construction or implication of law, as well as an express trustee." So, even if a surviving partner could be regarded as a trustee, he would not be within the provision of the statute relating to remuneration.

Besides this, there is authority for the statement that a surviving partner is not a trustee at all: *Knox v. Gye* (1872), L.R. 5 H.L. 656. His position, no doubt, imposes certain obligations and duties which are in their nature fiduciary; but it is not every one who is subjected to these obligations and restraints who can claim to be a trustee and entitled to all the privileges of a trustee. A wider construction has been adopted in the interpretation of the statutory provision corresponding with sec. 27: see *In re Lands Allotment Co.*, [1894] 1 Ch. 616, at p. 632; but I am precluded from applying this reasoning to the case in hand because of the view I entertain that sec. 40 applies only to express trustees.

The result is, that both appeal and cross-appeal succeed to the extent indicated; and, as success is divided, there should be no costs.

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It is *ultra vires* of a company incorporated under the Ontario Companies Act, R.S.O. 1897, ch. 191, to issue shares at a discount; and *held*, that the respondent, who had paid for five shares and was allotted by the company seven and a half shares described as fully paid-up (the extra shares being regarded as paid for by services rendered in promoting the company), and had acquiesced and acted as a holder of seven and a half shares, was not entitled, upon the ground of mistake, to be relieved from his position as a shareholder in respect of the extra two and a half shares; and a resolution of the shareholders, "that all stock certificates which have been regarded in the light of bonus stock be recalled into the company," and what was done under it, namely, the cancellation of the respondent's certificate for seven and a half shares and the issue of a new certificate to him for five fully paid-up shares, were *ultra vires* of the company; and the respondent was liable, upon the winding-up of the company, as a contributory in respect of two unpaid shares—not two and a half, because there is no warrant in the Act to allot anything less than a share, and the respondent's liability did not extend to the half share.

Sections 10, 33, and 37 of the Ontario Companies Act, R.S.O. 1897, ch. 191, considered.

Review and application of cases under the English Companies Acts.

*Ooregum Gold Mining Co. of India v. Roper*, [1892] A.C. 125, specially referred to.

The mistake of the respondent was not a mistake of fact, but a mistake as to the law.

*Re Cornwall Furniture Co.* (1910), 20 O.L.R. 520, followed.

AN appeal by the liquidator of the company from an order of the Local Master at Cornwall, dated the 12th September, 1911, refusing to settle the name of Munro, the respondent, on the list of contributories in respect of two shares and one half-share of the capital stock of the company, upon a reference for winding-up under the Dominion Winding-up Act.

November 20, 1911. The appeal was heard by MEREDITH, C.J.C.P., in the Weekly Court at Toronto.

*George Wilkie*, for the liquidator.

*J. A. Macintosh*, for the respondent.

April 17, 1912. MEREDITH, C.J.:—The facts, as far as they are material to the question for decision, are undisputed,



and are: that the respondent was asked by McGill, a director of the company, to subscribe for shares, and was promised seven and a half fully paid-up shares of \$100 each, for \$500; and he was advised by Pitts, another director, to do so. The respondent agreed to take the shares on these terms, and accordingly subscribed for them and paid the \$500, receiving on the 16th January, 1907, a stock certificate describing the shares as fully paid-up.

This transaction was not an isolated one; for, as I understand, all the shares issued by the company were subscribed for and allotted on the same terms.

All parties acted in good faith and under the belief that the transaction was one into which the company might lawfully enter.

A resolution of the directors had been passed on the 31st October, 1906, "that services in connection with the promotion and organisation of the McGill Chair Company be paid for in fully paid-up shares of the stock of the company, and that certificates be issued for the same."

Instead of allotting bonus shares to the persons who had rendered the services mentioned in the resolution, the plan was adopted of giving to each person who subscribed for shares three shares for every two for which he paid, or at that rate; the additional fifty per cent. being provided by the shares the issue of which was authorised by the resolution.

Although this was the plan adopted, Munro was treated in the books of the company as having subscribed for five shares, and paid for them with the \$500, and as holding two and a half shares paid for by "services rendered in connection with promoting this company."

The respondent, on the 24th April, 1908, gave a proxy to Mr. Campbell to vote for him at a shareholders' meeting to be held on the 27th of that month, and in it he described himself as the holder of seven and a half shares; and the respondent himself attended two of such meetings.

In January, 1910, the company, as the learned Master puts it, was in deep water financially.

Some of the shareholders, to whom shares had been allotted

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on similar terms to those on which the respondent's shares were allotted to him, had, about a year before this, learned of the illegality of the transaction, and demanded that the certificates which had been issued to them should be cancelled and new certificates issued for the shares for which they had fully paid in cash. These demands and occasional threats of legal proceedings to enforce them continued during the year preceding the passing of the resolution to which I shall next refer.

On the 14th January, 1910, at a meeting of the shareholders it was resolved: "That all stock certificates which have been regarded in the light of bonus stock be recalled into the company, and whereas Thomas McGill performed special services in connection with the promotion of the company is desirous of retaining his stock that he may be exempt from the above resolution."

The respondent made no separate demand to have his bonus shares cancelled, but he was present at this meeting and voted in favour of the resolution.

In pursuance of this resolution, the stock certificates, except McGill's, were called in and cancelled, and on the 22nd January, 1910, a new certificate was issued to the respondent for five fully paid-up shares.

In the view of the Master, the respondent, in accepting the seven and a half shares, acted under a mistake of fact; and, having repudiated the bonus shares, as the Master found, as soon as he became aware of the mistake, he was entitled to have the allotment of them cancelled, as was done.

The mistake under which, as the Master thought, the respondent acted was in believing that the seven and a half shares were, as they were represented to be, fully paid-up.

I am unable to agree with this view. The mistake of the respondent was not, in my opinion, a mistake of fact, but a mistake as to the law.

It is not like the case of *Burkinshaw v. Nicolls* (1878), 3 App. Cas. 1004, where the company was held to be estopped from alleging that the shares were not fully paid-up, by the certificate which it had issued, and on the faith of which a third person had purchased the shares from the person described in the certi-

ficate as being the owner of them, stating that they were fully paid-up.

The respondent dealt directly with the company, and knew that he was purchasing from it shares that had not been issued to any one else, but were being issued then for the first time; and the mistake under which he laboured was the belief that the company had a right to issue shares to him at a discount of one-third of their face value, for that was the effect of the transaction.

The position of the respondent is well described by what was said by Bowen, L.J., in *Ex p. Sandys* (1889), 42 Ch. D. 98, 117. The defendant in that case sought to have the register rectified by striking out her name in respect of six hundred and seventy-three shares issued at a discount, and the money she had paid in respect of them repaid to her. "The question," said the Lord Justice, "is, whether the respondent, whose name is upon the register, has agreed to become a member. The original contract under which she applied for shares was not one that, as long as it rested *in fieri*, could have been enforced. She applied for shares to be given to her coupled with a condition which the law would not recognise, and the company had no right, disregarding the condition, to force upon her something which she had not asked for. If the case stood there, there would have been an end of the matter. The original contract was not one which could have been enforced, and in giving her the shares without attaching the condition to them, which she made a portion of her offer, the company were not giving her what she asked for. But the matter does not rest there, and this is just the point of the case. After her name was placed on the register and after she knew that her name was on the register, she did certain acts which were only consistent with an intention on her part to be treated as a member of the company, and to treat herself as a member of the company in respect of these particular shares which had been so appropriated to her. If that is not evidence of an agreement to be a member, I really do not know what is." Lindley, L.J., in the same case (p. 115), says: "There never has been from the beginning to the end any mistake on her part about the facts. Such a mistake as there has been was a mistake by her, if any, as to the legal effect of what she has

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done. She has not taken these shares on the theory or supposition that they were in fact paid-up to the full extent of £5. She knew all the time that they were not paid-up, and were never intended to be paid-up. No doubt she thought, not knowing the law, that she never would have to pay the balance. . . . Now the moment she gets these shares and finds she is on the register, what does she do? Does she repudiate? Assume she might, but does she? Quite the reverse; being still in ignorance, as she says, of her rights—not in ignorance of any material fact, but being still in ignorance, or under an erroneous impression as to the legal effect of what she is about—she treats herself as a shareholder in respect of these shares.” And Cotton, L.J., points out (p. 113) that there was in the case what was wanting in *In re Almada and Tirito Co.* (1888), 38 Ch. D. 415, namely, the assent of the shareholder to her name being on the register in respect of the shares; and he distinguished *Beck’s Case* (1874), L.R. 9 Ch. 392, saying that “the mistake on which the applicant was there relying was not a mistake in law, but a mistake in fact;” and, after a reference to the facts of that case, he added: “If there had been a mistake of the general law of the country, he could not have been relieved. But what the Lords Justices held was, that he was entitled to have his name struck off the register because he had been put on under a contract entered by him under a mistake in fact, of which he was entitled to have the benefit.”

In *Welton v. Saffery*, [1897] A.C. 299, the shares had been issued at a discount, and it was held that the holders of them were not released from liability in a winding-up to calls for the amount unpaid on their shares, for the adjustment of the rights of the contributories *inter se*, as well as for the payment of the company’s debts and the costs of winding-up. Speaking of the nature of the transaction, Lord Macnaghten said (pp. 321-2): “The truth is, as it seems to me, that there never was a contract between the company or the shareholders, on the one hand, and the persons to whom these discount share were offered, on the other. There was an offer by the directors purporting to act on behalf of the company, but it was an offer of that which the company could not give, because the law does not allow it. There was an acceptance by the discount shareholders of that



offer. But that offer and acceptance could not constitute a contract. Both parties acted under a misconception of law, and the whole thing was void. The company, however, placed the names of the discount shareholders on the register; they allowed their names to remain there until their remedy against the company was gone; and now they cannot be heard to say that they were not shareholders.”

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*Ex p. Sandys* was followed by Britton, J., in *Re Cornwall Furniture Co.* (1910), 20 O.L.R. 520, and his decision was affirmed by the Court of Appeal. The question in that case was as to the position of persons to whom bonus shares had been issued; and, dealing with it, the Chief Justice of Ontario said (p. 533): “It is now too late for these persons to ask to be relieved from their position as holders of the shares which they thus acquired. No doubt, they acted under a mistaken belief, but that fact does not suffice to entitle them to be relieved. Having assented to the allocation of the shares and accepted the position of holders in respect of them, they cannot be relieved from the liability attached to the position simply because they made a mistake in the general law. There is no question that the facts were fully known to them.”

In the *Cornwall* case, the question arose after an order for a winding-up of the company had been made; and I refer to it only for the purpose of shewing that a mistake such as that under which the respondent laboured is a mistake as to the law, and not a mistake as to facts.

In the English cases it will have been noticed that the assent of the shareholder to his name appearing on the register of shareholders is spoken of as the determining factor for fixing him with liability as a shareholder; and in the case at bar there is nothing to shew that the respondent knew that his name had been entered in the register as the holder of the seven and a half shares. That circumstance is not, in my opinion, material, as the real determining factor is his knowledge that the company treated him as a shareholder and his acquiescence in being so treated, and that I take to have been the opinion of the Chief Justice of Ontario, judging from his observations in the *Cornwall* case which I have quoted—“Having assented to

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the allocation of the shares and accepted the position of holders in respect of them, they cannot be relieved. . . .”

The Act under which the company was incorporated, the Ontario Companies Act, R.S.O. 1897, ch. 191, contains no provision similar to sec. 25 of the English Companies Act of 1867, which provides that every share “shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares.”

It is clear, however, from *Ooregum Gold Mining Co. of India v. Roper*, [1892] A.C. 125, that, apart altogether from the provisions of sec. 25, the issue of shares at a discount is *ultra vires* a company whose capital is divided into shares of a fixed amount, and the liability of the shareholders of which is limited to the amount unpaid on their shares. See the observations of the Lord Chancellor (p. 134), Lord Watson (pp. 135-6), Lord Macnaghten (p. 145), and Lord Morris (p. 148). See also *Welton v. Saffery*, *supra*.

There is, in my opinion, no reason why these and similar cases should not be applicable to companies incorporated under the law of Ontario.

The Ontario Companies Act, R.S.O. 1897, ch. 191, requires that the number of the shares and the amount of each share shall be stated in the application for incorporation (sec. 10); and sec. 33 provides that “not less than ten per centum upon the allotted shares of stock of the company shall, by means of one or more calls formally made, be called in and made payable within one year from the incorporation of the company; the residue when and as the by-laws of the company direct;” and, although there is no express provision limiting the liability of shareholders to the amount unpaid on their shares, sec. 37, impliedly at all events, so limits it; and the constitution of a company incorporated under that Act possesses, therefore, both of the features which led to the conclusion that it was *ultra vires* of a company incorporated under the English Act of 1867 to issue shares at a discount; and in the reported cases in this Province the English decisions have been applied, notwith-

standing the absence of any provision in our Companies Acts similar to sec. 25 of the English Companies Act.

For these reasons, I am of opinion that the respondent was not entitled, upon the ground of mistake, to be relieved from his position of shareholder in respect of the two and half shares; and it follows, I think, that the resolution of the 14th January, 1910, and what was done under it, was *ultra vires* the company.

In the *Ooregum* case the Lord Chancellor (at p. 133) said: "It seems to me that the system thus" (*i.e.*, by the Companies Act) "created by which the shareholder's liability is to be limited by the amount unpaid upon his shares, renders it impossible for the company to depart from that requirement, and by any expedient to arrange with their shareholders that they shall not be liable for the amount unpaid on the shares, although the amount of those shares has been, in accordance with the Act of Parliament, fixed at a certain sum of money. It is manifest that if the company could do so the provision in question would operate nothing. I observe in the argument it has been sought to draw a distinction between the nominal capital and the capital which is assumed to be the real capital. I can find no authority for such a distinction. The capital is fixed and certain, and every creditor of the company is entitled to look to that capital as his security."

In *Bellerby v. Rowland & Marwood's Steamship Co.*, [1902] 2 Ch. 14, the Master of the Rolls, quoting this passage from the speech of the Lord Chancellor, added (p. 26): "And the opinions of the other learned Lords are to the same effect. The justification of forfeitures rests upon the statute itself, and I think that since *Trevor v. Whitworth* (1887), 12 App. Cas. 409, no authority can be relied on as justifying a surrender having the effect of reducing capital which cannot be supported as a form of forfeiture." Stirling, L.J., in the same case (p. 29), expressed the opinion that "the weight of authority is in favour of the view that forfeiture, which is specifically mentioned in the Act of 1862, stands on a special footing, and that surrenders can only be supported in circumstances which would justify forfeiture." Cozens-Hardy, L.J. (p. 31), dealing with the same question, says: "When, however, the transaction involves, as in

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the present case, the release by the company to the shareholder of uncalled capital on their shares it seems to me that it is, within *Trevor v. Whitworth*, a reduction of capital not sanctioned by law. The decision of the House of Lords in the *Ooregum* case, that shares in a limited company cannot be issued at a discount, involves the principle, that the company cannot be any device relieve a shareholder from the liability to pay the full amount due on his shares. This would be the result, if the shares had been retained by the plaintiffs, instead of being surrendered to the company. But the fact that in consideration of the release the shares were surrendered seems to me to render the transaction no better. Uncalled capital is part of the assets of the company. . . . The company, therefore, parted with £415, a portion of its assets, in consideration of the acquisition of the shares. This was a purchase of the shares, and is directly within the authority of *Trevor v. Whitworth*."

I do not understand how half a share came to be allotted. I find no warrant in the Act to allot anything less than a share, and I do not think that the liability which, I hold, attached to the respondent, extends to the half share which the company assumed to allot to him. This point was not taken on the argument, and counsel may speak to it if the appellant contends otherwise; and, subject to this, an order will issue allowing the appeal and substituting for the order of the Local Master an order that the name of the respondent be put upon the list of contributories in respect of two shares.

There will be no costs of the appeal or of the application to the Local Master.

Since writing the foregoing, my attention has been called to a recent decision of my brother Middleton, *Re Matthew Guy Carriage and Automobile Co., Thomas's Case* (1912), 3 O.W.N. 902, which, it is said, is opposed to the view I have expressed as to the effect of the resolution to cancel the shares and the action taken upon it. I find, however, on inquiry from my learned brother, that it is not, and that in that case the contract to take the shares was still executory at the time the resolution to cancel the bonus shares was passed.

[Leave to appeal to the Court of Appeal from the above decision was granted by MIDDLETON, J., on the 27th May, 1912: see 3 O.W.N. 1326.]



[IN CHAMBERS.]

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*Municipal Elections—Township Councillor and Deputy Reeve—Qualification—Transfers of Qualifying Properties after Election—Right to Hold Seats—Qualification as Mortgagees—Defect in Declarations—Right to Make Fresh Declarations—Consolidated Municipal Act, 1903, secs. 76, 219, 220, 311—Procedure in Attacking Right to Hold Seats—Notice of Motion in Nature of Quo Warranto—Time—Amendment.*

The respondents were declared elected councillor and deputy reeve respectively of a township. Both had been assessed as freeholders, and were admittedly qualified at the time of the election. The councillor elect made an absolute conveyance of his qualifying property, delivered and registered before the 8th January, on which day he made a declaration of qualification purporting to be in pursuance of sec. 311 of the Consolidated Municipal Act, 1903, and took his seat as councillor. The declaration omitted the word "and" between the words "have" and "had" in the third line of the form in the statute, sec. 311—thus reading "I have had to my own use and benefit . . . at the time of my election . . . such an estate as does qualify me," etc. The deputy reeve elect also disposed of his only qualifying property; but this occurred after he made the declaration and took his seat. The declaration was in the same defective form. The councillor elect took as part of the purchase-money of his property a mortgage thereon for \$4,100, and the deputy reeve elect took a mortgage in the same way for \$4,500:—

*Held*, that the statute lays down three prerequisites to a *de jure* occupation of the office: (1) possession of property qualification; (2) election by acclamation or otherwise; (3) making the declaration prescribed; and absence of any one of these will prevent the seat being filled *de jure*.

And *held*, that the declarations made by the respondents were not in the form nor to the same effect as the form prescribed by the statute; and neither respondent was *de jure* a member of the council.

*Held*, also, that the relator had the right to proceed by notice of motion in the nature of a *quo warranto*, under secs. 219 and 220 of the Municipal Act, 1903, to attack the right of the respondents to hold their seats.

*Held*, also, that, as the facts in regard to the transfers of the properties and the form of the declaration came to the knowledge of the relator only within six weeks of the application, he was in time under the amendment made to sec. 220 of the Act of 1903, by 7 Edw. VII. ch. 40, sec. 5.

*Held*, also, that the notices of motion should be amended by setting up the omission to make the statutory declaration.

*Held*, also, that, if the respondents could now make the declaration required by sec. 311 of the Act, they should be allowed to do so, and so make their occupancy of the offices *de jure*.

*Regina ex rel. Clancy v. Conway* (1881), 46 U.C.R. 85, followed.

*Held*, also, that the respondents, as mortgagees holding the legal estate in the lands which they had conveyed, although not mortgagees in possession, had the qualification required by sec. 76 of the Consolidated Municipal Act, 1903—there is nothing in principle or authority to prevent a mortgagee who is assessed for the property qualifying on his legal estate.

History of the legislation and review of the authorities.

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APPEALS by the respondents from orders of the Junior Judge of the County Court of the County of Wentworth declaring that the respondents had lost the right to hold their seats as councillor and deputy reeve respectively for the township of Barton, having become disqualified since their election to those offices.

April 9. The appeals were heard by RIDDELL, J., in Chambers.

*J. G. Farmer*, K.C., for the respondent Roberts.

*A. M. Lewis*, for the respondent Rymal.

*W. A. H. Duff*, K.C., for the relator.

April 16. RIDDELL, J.:—At the recent municipal election in the township of Barton, such a number of nominations were made as would apparently necessitate a taking of votes; but at the proper time, a sufficient number resigned (Consolidated Municipal Act, 1903, sec. 129 (2), (3)) to enable the clerk (sec. 129 (4)) to declare the remaining candidates duly elected. Accordingly, Roberts was declared elected councillor and Rymal deputy reeve.

Roberts had been assessed as freeholder on a certain lot, and was admittedly “qualified” at the time of the election. He, however, by deed dated the 5th January, registered on the 6th January, conveyed the land by deed absolute to one McDonald, having on the 1st January taken a mortgage for \$4,100. Notwithstanding this transfer, he made a declaration of qualification purporting to be in pursuance of sec. 311 of the Act and amending statutes, on the 8th January, and upon that day took his seat as councillor, and still continues to hold it.

The declaration omitted the word “and” between the words “have” and “had” in the third line of the form in the statute, sec. 311.\*

Upon motion before His Honour Judge Monck, that learned Judge made an order declaring “that the said Walter Roberts hath lost his right to hold his seat as a councillor of the township of Barton, and hath become disqualified since his election to hold his said seat, he having since his said election sold and disposed of the property on which he qualified, and not being otherwise

\* “. . . have and had to my own use and benefit . . . at the time of my election to the office . . . such an estate as does qualify me to act in the office. . . .”

qualified or possessing the necessary qualification required by the Consolidated Municipal Act, 1903, and amendments thereto, and said seat is vacant."

Rymal had also been assessed for certain property, and admitted was duly "qualified" at the time of the election; but he also conveyed his property by deed of date the 28th December, affidavit of execution the 6th January, registered the 23rd January, on which day the transaction was completed by Rymal taking a mortgage for \$4,500 for part of the purchase-money and handing over the deed.

The learned Judge says of this transaction: "Rymal also disposed of his only qualifying property, but this occurred after he took the oath of qualification and after he took his seat." Rymal made, on the 8th January, a declaration in the same defective form as that made by Roberts, and took his seat as deputy reeve, and still claims it. A motion before Judge Monck resulted in a similar order—each respondent was ordered to pay costs.

Both Roberts and Rymal now appeal.

The learned Judge proceeded on the ground that the property qualification of a member of a municipal council was a continuing qualification; and that, once the property qualification originally necessary was lost, the incumbent of the office became *ipso facto* disqualified.

In the view I take of the case, I do not think I need pass upon that question. It is, however, to be observed that from almost the very earliest times the qualification has been expressed to be that entitling a person "to be elected."

The first general Act (1838), 1 Vict. ch. 21, providing for the election of certain officers—clerk, assessor, collector, etc.—has no qualification for the officer to be elected, although it has for the voter (secs. 2, 4).

The Municipal Act of 1841, 4 & 5 Vict. ch. 10, sec. 11, provides that "every person to be elected a member of a District Council . . . shall be seized and possessed," etc., etc.

Baldwin's Act, 12 Vict. ch. 81, secs. 22, 57, 65, 83, contains the same language; the Act of 1858, 22 Vict. (stat. 1) ch. 99, which is the same as (1859) C.S.U.C. ch. 54, sec. 70, also; and the

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terminology appears in the various amendments and re-enactment down to the present Act of 1903, sec. 76. Sometimes, indeed, the provision is negative, as at present, and sometimes positive, as was the original form—but, whether it be “no person but,” or “every person who,” it is always “to be elected.”

Language quite different was used almost from the first in respect of certain cases. It is true that in the Act 4 & 5 Vict. ch. 10 it was provided (sec. 12) that “no person . . . in Holy Orders or . . . Minister . . . of any religious sect . . . nor any Judge . . . shall be qualified to be elected a councillor . . . ;” but the language was soon changed. In the Act of 1849, by sec. 132, it was enacted “that no Judge . . . and no person having . . . any interest . . . in any contract with . . . the Township . . . shall be qualified to be or be elected . . . councillor . . .” And in Baldwin’s Act, C.S.U.C. ch. 54, sec. 73, it is provided that such person shall not be qualified “to be a member of the Council of the Corporation.” The same language continues down to the present Act, sec. 80 (1).

And, in like manner, the Act of 1849, sec. 112, provides that, if any member of a municipal council “be declared a bankrupt . . . or shall compound by deed with his creditors, then . . . such person shall . . . immediately become disqualified, and shall cease to be a member of such municipal corporation . . . and the vacancy thereby created . . . filled as in the case of the natural death of such member . . .” In the C.S.U.C. ch. 54, sec. 121, the occasions for the seat becoming vacant are increased in number, introducing amongst others “assigns his property for the benefit of creditors”—and so it has continued to the present time (Consolidated Municipal Act, 1903, sec. 207), appearing in substantially the same words in the nine or ten re-enactments and amendments.

The difference in the terminology affords a very cogent argument against the view that the Legislature intended the sale of the qualifying property to operate as an act *ipso facto* disqualifying the member, at all events after proper declaration of qualification made—had that been the intention, it is difficult to see why the provision that an assignment for the benefit of



his creditors is made specifically a ground of disqualification, without the addition "a sale or assignment of qualifying property."

So in the Act of 12 Vict. ch. 81, sec. 110, it is provided that the absence of the head of the council "vacates" the seat.

On the other hand, a consideration of the form of the oath or declaration affords a strong argument that the ownership of the property qualification must continue—at all events until the oath or declaration was made. And this will appear during the consideration of the forms laid down, which I shall speak of in another point of view. For I do not intend to decide these cases upon the ground taken by the County Court Judge.

From a very early period it has been a statutory requirement that a councillor, etc., should make a declaration (or take an oath). The Act of 1838 provides for a promissory oath, and it was to be made (secs. 9, 36) within twenty days of being notified of election, upon penalty of a fine of £5. But the Act of 1841 contained a provision "that no person elected a councillor . . . shall be capable of acting as such until he shall have taken and subscribed" the statutory oath—and he was given (sec. 16) ten days after notice of his election to take this oath, otherwise he was deemed to have refused the office, and was liable to a fine—his office was deemed vacant and a new election had. The oath is not only promissory (sec. 15), but also "that I am seized and possessed, to my own use, of lands," etc., and that such "lands are within the District of . . . and are of the real value of £300," etc., etc. The Baldwin Act, 12 Vict. ch. 81, provides (sec. 129), "that every person who shall be elected . . . to any office which requires a qualification of property . . . shall, before he shall enter into the duties of his office, take and subscribe an oath or affirmation to the effect following, that is to say: 'I, A. B., do swear . . . that I am truly and *bonâ fide* seized to my own use and benefit of such an estate (specifying it) as *doth qualify me to act* in the office of (naming it) . . . according to the true intent and meaning of a certain Act of Parliament,'" etc., etc. Note that in these earliest qualification oaths the present tense is used in speaking of the owner-

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ship, and also (in 12 Vict.) that the ownership of the estate *doth* qualify to *act* in the office.

The language in 22 Vict. (stat. 1) ch. 99, sec. 175, is, "before he . . . enters on his duties . . . ;" and the declaration (a solemn declaration now being substituted for an oath) is still, "I am truly and *bonâ fide* seized . . . doth qualify me *to act* in the office," etc.

The statute 29 & 30 Vict. ch. 51, sec. 178, makes no change from the language of the Consolidated Statute—the Act of 1873, 36 Vict. ch. 48, sec. 211, brings in the form still in use—"have and had to my own use and benefit . . . as proprietor . . . at the time of my election to the office of . . . does qualify me to act . . ."—precisely the same as the form in the statute of 1903, sec. 311 (the word "proprietor" being used instead of "owner"), but without the addition made by (1906) 6 Edw. VII. ch. 34, sec. 10.

The statute, in my view, lays down three prerequisites to a *de jure* occupation of the office (I do not pause to inquire as to others): (1) possession of property qualification; (2) election by acclamation or otherwise; (3) making the declaration prescribed. Absence of any one of these will prevent the seat being filled *de jure*—absence of one or all will not, of course, prevent it being filled *de facto*.

"Where the statute requires a prescribed oath of office *before* any person elected '*shall act therein*,' a person cannot justify as such officer *unless he has taken an oath* in substantial, not necessarily literal, compliance with the law:" Dillon on Municipal Corporations, 5th ed., sec. 395, and American cases cited in note 1, at bottom of p. 680.

In *The King v. Swyer* (1830), 10 B. & C. 486, the capital burgesses and common council of Shafton were authorised to elect one of the burgesses each year to be mayor. The charter provided that "he who . . . shall be elected . . . mayor . . . before he be admitted to execute that office, or in any way to intermeddle in the same office, shall . . . take . . . all the oaths by the laws . . . appointed . . . and that after such oath so taken, he can and may execute the office of . . . mayor . . ." Lord Tenterden, C.J. (p. 491): "A party

becomes mayor not merely by reason of his being elected, but of being sworn into office." Bayley, J. (pp. 491, 492): "By the clause authorising the election of a mayor, the capital burgesses are to elect and nominate one of the burgesses to be mayor: and he, before he executes his office, is to be sworn in. He becomes the head of the corporation not when he is elected and nominated, but when he is sworn in." It will be seen that no point is made of the clause in the charter that "after such oath so taken, he can and may execute the office of . . . mayor," which is the only point of differentiation between the Shafton charter and our statute in that regard.

In *The King v. Mayor, etc., of Winchester* (1837), 7 A. & E. 215, the language of the statutes (9 Geo. IV. ch. 17, secs. 2, 4, and 5, and 5 & 6 Wm. IV. ch. 76, sec. 50) is a little different, but not substantially so—and Lord Denman, C.J. (p. 221), clearly shews that it is the making of the declaration that constitutes the acceptance of the office. See also *per* Littledale, J., at p. 222.

In a case under our own statute, upon language identical with that in the present statute, Cameron, J. (afterwards Sir Matthew Cameron, C.J.), said: "I am of opinion that until a person elected a member of a municipal corporation has made the declaration of qualification prescribed by the 265th section of ch. 174, R.S.O. 1877, he has no right to exercise or discharge the functions pertaining to the office:" *Regina ex rel. Clancy v. St. Jean* (1881), 46 U.C.R. 77, at p. 81. On p. 81 the learned Judge continues: "I think there can be no doubt that this declaration is an essential prerequisite to the discharge of the duties of the office of alderman." In the case of *Regina ex rel. Clancy v. Conway* (1881), 46 U.C.R. 85, at p. 86, the same learned Judge gave (in a certain event, which will be considered later) leave to file an information in the nature of a *quo warranto*, "on the ground that without making the declaration of qualification he (Conway) illegally exercises the franchises of the office."

Such cases as *United States v. Bradley* (1836), 10 Peters 343, are quite different, as they determine only that an appointment in the nomination of the President, upon confirmation by the Senate of the United States, becomes an absolute appointment,

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vesting the office in the nominee upon appointment by the President and confirmation by the Senate, although the nominee has not given the bond which a statute requires him to give for the security of the Government. Compare *United States Bank v. Dandridge* (1827), 12 Wheat. 64.

It can scarcely be seriously argued that the declaration taken is "to the effect" of the form in the statute. As we have seen, the earliest form of declaration of qualification was in the oath in sec. 129 of the Act of 12 Vict.: "I am truly and *bonâ fide*," etc.; and this continued until the Act of 1873. At that time it seems to have been considered proper to make sure that the declarant had been, at the time of the election, properly qualified—and not simply was possessed of the property qualification at the time of the declaration. It might happen that one not really having the property qualification would offer himself for election, and, if elected, buy property for his qualification. But from the very first the present tense is found somewhere in the oath—and it is wholly absurd to suggest or argue that declaring, "I have had property," etc., is to the same effect as declaring, "I have and had property," etc.

It must be held that neither respondent is *de jure* a member of the council.

We have next to consider whether the present procedure is open to the relator—and two strong cases at first sight seem adverse; but I think the apparent difficulty will disappear when the course of the legislation is examined. In *Regina ex rel. Grayson v. Bell* (1865), 1 U.C.L.J. N.S. 130, it was alleged that the candidate's declaration was not proper, but that it set out property of which in fact he was not the owner. Hagarty, J. (afterwards Sir John Hagarty, C.J.O.), refused a writ of summons in the nature of a *quo warranto*.

So, also, in *Regina ex rel. Halsted v. Ferris* (1870), 6 U.C.L.J. N.S. 266, Mr. Dalton, C.C. & P., refused to unseat Ferris, on the ground alleged that the declaration made by him was insufficient, saying: "Nothing can be made of this objection on this application. Whatever might be the effect of the omission to describe the nature of the estate on a *quo warranto* at common law, it affords no ground for declaring, in this statutory pro-



ceeding, that the election was not legal, or was not conducted according to law, or that the person declared elected thereat was not duly elected.”

The common law writ of *quo warranto*—sometimes called *quo jure*—was used by the King to call upon any subject who exercised office or a franchise, to shew by what authority the office or franchise was enjoyed—it might also be used by the King to call upon one who held land, to shew by what title or warrant he held. The right to such a writ rested, of course, upon the principles that the King has the sole power of bestowing offices and franchises and he is lord paramount of all land within the kingdom. The writ, which was an original writ out of Chancery, fell into disuse early, probably in the times of Richard II. (Coke, 2 Inst. 498, etc.), and an information in the nature of a *quo warranto* took its place. This was much abused in Stewart times, but has survived; and still may be put in action in a proper case—it lies against persons who claim any office, franchise, or privilege of a public nature, and not merely ministerial and held at the will and pleasure of others: *Darley v. The Queen* (1845), 12 Cl. & F. 520.

As it was held that at the common law the King alone could have such an information against those usurping offices, etc., in municipal corporations, the statute 9 Anne ch. 20 was passed, providing for the issue of such informations at the instance of private prosecutors in such cases—and this statute became part of our law by the Provincial Act, 32 Geo. III. ch. 1.

Both in England and in Upper Canada, the practice in such cases has been simplified: the statutory provisions are in cases covered by the statutes now taken advantage of—but, if there be any *casus omissus*, the information under the Statute of Anne may be still appealed to. In our own Courts, the most recent case I know of is *Regina ex rel. Moore v. Nagle* (1894), 24 O.R. 507. *Askew v. Manning* (1876), 38 U.C.R. 345, is another case.

By the Act of 12 Vict. ch. 81, sec. 146, it was provided “that at the instance of any relator having an interest as a candidate or voter in any election . . . a writ of summons, in the nature of a *quo warranto*, shall lie to try the validity of such election, which writ shall issue out of His Majesty’s Court of Queen’s

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Bench . . . upon such relator shewing upon affidavit . . . reasonable grounds for supposing that such election was not conducted according to law, or that the party elected or returned thereat was not duly or legally elected or returned." Thenceforward, the writ of summons was used instead of the information in the nature of a *quo warranto* in cases to which it was applicable.

When the case *Regina ex rel. Grayson v. Bell*, 1 U.C.L.J. N.S. 130, was decided (in 1865), the statute in force was the C.S.U.C. 1859, ch. 54, which provided (sec. 128 (1)) that, "If . . . the relator shews by affidavit to any such Judge, reasonable grounds for supposing that the election was not legal or was not conducted according to law, or that the person declared elected thereat was not duly elected . . . the Judge shall direct a writ of summons in the nature of a *quo warranto* to be issued to try the matters contested." The only matters which could be thus contested were (sec. 127), "the right of any municipality to a reeve or deputy reeve, or . . . the validity of the election or appointment of a mayor, warden, reeve, deputy reeve, alderman, councilman, councillor or police trustee." It is in view of the provisions of the then existing statute that Hagarty, J., says: "As Bell was properly qualified, and nothing is alleged against the manner of his election, I do not see how I can interfere by *quo warranto*, because an apparent mistake" [the report by a clerical error reads "no apparent mistake"] "has been made in the description of the nature of an estate in property. . . ."

In 1870, when *Regina ex rel. Halsted v. Ferris*, 6 U.C.L.J. N.S. 266, was decided, the Act in force was (1866) 29 & 30 Vict. ch. 51; the provisions for a writ of summons in the nature of a *quo warranto*, and the description of the matters that could be tried under such a writ, are *totidem verbis et literis* the same as in the C.S.U.C.: see 29 & 30 Vict. ch. 51, secs. 130, 131.

The statute 36 Vict. ch. 48, secs. 131, 132, was the same, and also R.S.O. 1877, ch. 174, secs. 179, 180, which last contained the statutory enactments when the two cases of *Regina ex rel. Clancy v. St. Jean* and *Regina ex rel. Clancy v. Conway*, 46 U.C.R. 77, 85, came on. And it was due to the limited class of cases for the

application of the statutory procedure that in these cases an information, and not a writ of summons in the nature of a *quo warranto*, was applied for.

In 1892, by sec. 188 of the statute 55 Vict. ch. 42, a notice of motion in the nature of a *quo warranto* was substituted for a writ of summons: and this practice has continued to the present time; the statute 60 Vict. ch. 15, schedule C (44), struck out in the beginning all reference to the right of a municipality to a reeve or deputy reeve; and 3 Edw. VII. ch. 18, sec. 32, made a most important change: "In case the validity of the election or the appointment or the right to hold the seat of a mayor, warden, reeve, alderman, county councillor or councillor is contested," etc. etc. Before that time it was only the validity of the election which could be challenged in the statutory method—thereafter the right to hold a seat could be attacked in the same way. Section 33 made a corresponding change in the material to be presented to the Judge upon application in the first instance. The consolidation of 1903, 3 Edw. VII. ch. 19, sec. 219, followed, and that Act has been slightly amended by 6 Edw. VII. ch. 35, sec. 26, and 9 Edw. VII. ch. 73, sec. 5 (1).

The scope of the statutory remedy being extended to cover the case of a contest as to a deputy reeve's and a councillor's right to sit, there can be no doubt that the practice followed here is proper.

It would seem that the facts as to the transfer of the property, and I suppose the form of the declaration, came to the knowledge of the relator only within six weeks of the application; and, consequently, he is in time under the amendment made to sec. 220 of the Consolidated Municipal Act, 1903, by the statute of 1907, 7 Edw. VII. ch. 40, sec. 5.

The form of notice of motion is: "Take notice that by leave of His Honour Judge Monck, Junior Judge of the County Court of the County of Wentworth, a motion will be made on behalf of the above named John E. Morton, of the township of Barton, in the county of Wentworth, dairyman, and an elector entitled to vote at a municipal election in the said township of Barton, before the presiding Judge in Chambers, at the court house in the city of Hamilton, on the 8th day after the day of service

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of this notice on you (excluding the day of service), at the hour of eleven o'clock in the forenoon, or so soon thereafter as the motion can be heard, for an order declaring that the said Frank E. Rymal, the above-named defendant, hath lost his right to hold his seat as deputy reeve of the township of Barton, and has become disqualified since his election to hold his said seat, he having since his said election sold and disposed of the property on which he qualified, and not being otherwise qualified or possessing the necessary property qualification required by the Consolidated Municipal Act, 1903, and amendments thereto."

The statute provides (sec. 221 (2)) that "the relator shall, in his notice of motion, . . . state specifically, under distinct heads, all the grounds of objection to the validity of the election complained against, and in favour of the validity of the election of the relator, or other person or persons, where the relator claims that he or they, or any of them, have been duly elected, on the grounds of forfeiture or disqualification, as the case may be." This is from 3 Edw. VII. ch. 19, sec. 221, and makes no reference to a case in which the validity of the election is not complained of and no claim is made for the election of some one else—as in the present case. Accordingly, I think the notice of motion may be amended by setting up the omission to make the statutory declaration. Section 226 does not apply for the same reason—or, if it be considered that the first part applies on the *mutatis mutandis* principle, so does the second—and I think it eminently a case where "the Judge in his discretion" should "entertain any substantial ground of objection to" the right to hold the seat.

The mere fact that a proper declaration has not been made does not in itself compel the Court to declare the seat vacant. In *Regina ex rel. Clancy v. Conway*, 46 U.C.R. 85, Cameron, J., gave leave to the defendant to make the same within ten days, if he could; and he says in the other case, 46 U.C.R. at p. 82: "As the latter" (*i.e.*, the person elected) "can at any time put himself in a position to exercise the franchises of the office by making a proper declaration, his omission to make the declaration would not render the office vacant." This was a case of an imperfect declaration.



The form of the declaration contemplates that the declarant shall have, at the time of making the declaration, the qualification: no Court would allow a person to make a declaration which was false and so commit an indictable offence: Criminal Code, sec. 175. And, of course, no one with any sense of self-respect would desire to make a false declaration.

From very early times the refusal to make the declaration was held equivalent to a refusal of the office, even if the party was incapable of making it: *Attorney-General v. Read* (1678), 2 Mod. 299; *Starr v. Mayor, etc., of Exeter* (1683), 3 Lev. 116; affirming *S. C.*, 2 Show. 158; *Rex v. Larwood* (1693), Carthew 306.

If the elected can now make the declaration required by sec. 311, then, under *Regina ex rel. Clancy v. Conway, ut supra*, they should be allowed to do so, and so make their occupancy of the offices *de jure*, as it is now *de facto*.

The position of a mortgagee is well understood: he has the legal estate in the land, holding the legal estate and the land as security for his debt. Is this legal estate sufficient?

The early statutes do not employ the terminology now in use.

In 1 Vict. ch. 21, there is no qualification prescribed: but in 4 & 5 Vict. ch. 10, sec. 11, one to be elected must "be seized and possessed to his own use, in fee, of lands and tenements within the district . . . of the real value of £300 currency, over and above all charges and incumbrances due and payable upon or out of the same." Under 12 Vict. ch. 81, sec. 22, no one could be elected township councillor "who shall not have been entered upon the . . . roll as assessed for ratable real property held in his own right . . . as proprietor or tenant, to the value of £100 . . . ;" and under sec. 57 no one could be elected a village councillor "who shall not be possessed, to his own use, of real estate held by him in fee or freehold, or for a term of twenty-one years or upwards . . . of the assessed value of £250 . . ." Section 65 contains language similar to that of sec. 57; while sec. 83 provides for the qualification of an alderman—"seized, to his own use, of real estate held by him in fee simple, or in freehold . . . of the assessed value of £500 . . ." In 1858, 22 Vict. (stat. 1) ch. 99, sec. 70, a change was made—

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“have . . . in their own right or in the right of their wives, as proprietors or tenants, freehold or leasehold property rated . . . to at least the value . . .”

By the last Act before Confederation, 29 & 30 Vict. ch. 51, sec. 70, another change was made—“have . . . in their own right or in the right of their wives, as proprietors or tenants, a legal or equitable freehold or leasehold, rated . . .” There must have been some reason for introducing the expression “legal or equitable.”

In the consolidation of 1873, 36 Vict. ch. 48, sec. 71, another change was made—“have . . . in their own right, or in the right of their wives, as proprietors or tenants, a legal or equitable freehold or leasehold, or partly legal and partly equitable, rated . . .” This language is unaltered in R.S.O. 1877, ch. 174, sec. 70; 46 Vict. ch. 18, sec. 73; but 49 Vict. ch. 37, sec. 2, changes it to “legal or equitable freehold or leasehold, or partly freehold and partly leasehold, or partly legal and partly equitable;” and this reappears in 50 Vict. ch. 29, sec. 2, R.S.O. 1887, ch. 184, sec. 73; 55 Vict. ch. 42, sec. 73. The revisers in 1897, under the powers given by 60 Vict. ch. 3, sec. 3, changed the wording into its present form; and the Legislature adopted it as R.S.O. 1897, ch. 223, sec. 76; and now it appears as Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19, sec. 76—the amendment, 6 Edw. VII. ch. 35, sec. 5, not affecting this part of the section.

I think that the Legislature must have had in view the difference between legal and equitable estates: and that the language now employed, differing as it does from that formerly used, must be given full effect to.

What estate then had Rymal at the time of the election, and what estate has he now?

At the time of the election, it is plain that he had the legal estate, and that such legal estate was then worth not only the \$4,500 for which the mortgage was subsequently taken, but also the amount of cash paid by the mortgagor as well. At the present time, it is equally plain that he has the legal estate in the land—that, the mortgage being in fee, this is a freehold, a “legal freehold.” This could be mortgaged or sold at any time;

and, while it is indeed in equity but a security for the debt, it is a valuable security—and worth \$4,500. At the time of taking the imperfect declaration, there is no question that he could have made the declaration in proper form (owning as he did the whole estate, and the sale being still *in fieri*, and it not appearing that there was any enforceable contract for sale). Whether he can now make the declaration must be determined by the very words of the declaration itself. Leaving out the (for this inquiry) unimportant words, it reads thus: “I . . . do solemnly declare . . . that I have and had to my own use and benefit . . . as owner at the time of my election such an estate as does qualify me to act in the office of deputy reeve for . . . and that such estate is (specifying it) and that such estate at the time of my election was of the value of at least,” etc., etc. It is to be noted that the value at the time of making the declaration is not required to be set out.

At the time of the election he had a legal estate worth \$4,500 and more—no equitable estate had been carved out of it—now he has the very same legal estate, but it is worth only \$4,500, for an equitable estate has been created cutting down the value. I think that, employing the language of sec. 76, Rymal “has, as owner, a legal freehold which is assessed in his own name on the last revised assessment roll of the municipality to at least the value of \$4,500.”

But it is argued that mortgagees cannot be considered persons contemplated by the statute—and that they cannot qualify unless they are in possession. The rule that mortgagees should not vote unless they are in possession, so far as it exists at all, is statutory—and an examination of the statutes rather furnishes us with an argument that mortgagees have the same rights as to voting, etc., as any other owner of a freehold unless they are expressly excluded. The first Act is (1696), 7 & 8 Wm. III. ch. 25, which, by sec. 7, provides that “no person or persons shall be allowed to have any vote in election of members to serve in Parliament, for or by reason of any trust estate or mortgage, unless such trustee or mortgagee be in actual possession or receipt of the rents and profits of the same estate; but that the mortgagor, or *cestui que trust*, in possession, shall and may vote

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for the same estate, notwithstanding such mortgage or trust . . .” As it was only freeholders who were given the right to vote, it seems to me that Parliament considered a mortgagee a freeholder, and considered that he would have the right to vote, unless specially legislated against. The same provision excluding mortgagees and trustees not in possession appears in (1832) 2 Wm. IV. ch. 45, sec. 23, and in (1843) 6 & 7 Vict. ch. 18, sec. 74.

There are cases in which a mere trustee had been held not entitled to vote—e.g., *South Grenville Election, Jones’s Case* (1872), H.E.C. 163, at p. 176: but that was because of the words “in his own right”—shewing that it was a real beneficial ownership that was required by the statute.

I can find nothing in principle or authority to prevent a mortgagee who is assessed for the property qualifying on his legal estate.

The same considerations apply also to Roberts.

If they make a proper declaration, within ten days, their appeals will be allowed—but without costs here or below. They are given an indulgence in being allowed to make now a declaration which should have been made three months ago, and without which they had no right to their seats. It would seem necessary again to call attention to the necessity of observing the plain directions of the statutes, the forms prescribed, etc.

If the declaration be not made by either within ten days, the appeal of that one will be dismissed with costs.

While it is, in my view, probable that there is no necessity for the relator to file an affidavit that the facts as to the defect in the declaration came to his knowledge only within six weeks before the notice of motion was served, he will be permitted to do so, if so advised, for the greater caution in case of an appeal from this decision, or in case either of the respondents fails to make the proper declaration.



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*Company—Winding-up—Realisation of Assets—Claim by Trustee for Bondholders under Mortgage Given to Secure Bonds—Mortgage Covering Personal Property—Invalidity for Want of Registration—Bills of Sale and Chattel Mortgage Act, secs. 2, 5, 23—Agreement not to Register—Book-debts—Validity of Transfer without Registration—Absence of Notice to Debtors—Status of Liquidator to Contest Claim—Representation of Creditors—Jus Tertii—Parties.*

An incorporated manufacturing and trading company made a mortgage to the plaintiff, as trustee for bondholders, to secure payment of its bonds, of "its undertakings then made or in course of construction or thereafter to be constructed, together with all the properties, real or personal, tolls, incomes, and sources of money, rights, privileges, and franchises, owned, held, or enjoyed by it." The lands were specifically set out in the mortgage-deed; and it was "declared and agreed, for the purpose of this mortgage security, that all machinery, plant, and personal property of the company are to be considered fixtures to the realty. . . . This mortgage is not to be registered as a bill of sale or chattel mortgage." The company made an assignment for the benefit of creditors; and a winding-up order was afterwards made, under which the defendant was appointed liquidator; the defendant then took possession of all the assets, and realised such as were convertible. The plaintiff claimed the assets under the mortgage, and brought this action for an account, or, in the alternative, for damages for conversion:—

*Held*, that, as the charge upon the company's real and personal property was not created by the bonds, but by the mortgage, the latter was, so far as it purported to charge personal property, a "mortgage or conveyance intended to operate as a mortgage of goods and chattels, within the meaning of secs. 2 and 23 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1897, ch. 148; and, not having been accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged, and not having been registered as a chattel mortgage, was, as such, under sec. 5 of the Act, "absolutely null and void as against creditors of the mortgagor."

*Johnston v. Wade* (1908), 17 O.L.R. 372, distinguished.

*Semble*, that, as a chattel mortgage, it was also void *ab initio* as against creditors, by reason of the agreement that it should not be registered under the Bills of Sale and Chattel Mortgage Act: *Clarkson v. McMaster & Co.* (1895), 25 S.C.R. 96, 105, 106.

*Held*, also, that, although the mortgage-deed did not specifically mention present or future book-debts, the language above-quoted was sufficient to create an equitable charge on present and future book-debts; that book-debts are not within the Bills of Sale and Chattel Mortgage Act, and a transfer of them does not require registration; and, therefore, that as to any book-debts that were unpaid at the date of the assignment by the company, the plaintiff was entitled to recover the amount that was realised therefrom by the assignee or the defendant; and that the fact that no notice of the charge was given by the plaintiff to the debtors did not alter that right.

*Thibaudeau v. Paul* (1894), 26 O.R. 385, and *Re Perth Flax and Cordage Co.* (1909), 13 O.W.R. 1140, specially referred to.

*Held*, also, that the liquidator, being from the beginning *primâ facie* lawfully in possession of the property in question as an officer of the Court, and being charged with the duty of applying the proceeds in payment of the company's creditors in due course of administration, was entitled, in right of the creditors of the company, to contest the validity of the plaintiff's mortgage and to maintain in defence of the action the superior claim of the creditors whom it represented; and it was not necessary to have one of the creditors added as a party.

*Re Canadian Camera and Optical Co.* (1901), 2 O.L.R. 677, 679, followed.

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ACTION by the National Trust Company Limited, trustee for the bondholders of the Raven Lake Portland Cement Company, against the Trusts and Guarantee Company Limited, liquidator of the Raven Lake Portland Cement Company, for an account of the proceeds of certain goods and chattels, book-debts and choses in action, alleged to have been converted and sold and collected by the defendant, or, in the alternative, for damages for conversion. See *Re Raven Lake Portland Cement Co., National Trust Co. v. Trusts and Guarantee Co.* (1911), 24 O.L.R. 286.

March 11. The action was tried before TEETZEL, J., without a jury, at Toronto.

*R. C. H. Cassels*, for the plaintiff.

*W. Laidlaw*, K.C., for the defendant.

April 17, TEETZEL, J.:—The plaintiff is trustee for bondholders of the Raven Lake Portland Cement Company, hereinafter referred to as the company, and the defendant is liquidator of that company under the Dominion Winding-up Act.

By mortgage dated the 13th September, 1904, the company duly granted, assigned, transferred and conveyed and mortgaged to the plaintiff in trust, subject to a certain other mortgage, all and singular its undertakings then made or in course of construction or thereafter to be constructed, together with all the properties, real or personal, tolls, incomes, and sources of money, rights, privileges, and franchises, owned, held, or enjoyed by it then or at any time prior to the full payment of the bonds thereby secured, to secure payment of the bonds mentioned in the mortgage, amounting to \$50,000, and interest. The lands are specifically set out in a schedule attached to the mortgage. The mortgage also purports to cover "all machinery of every nature and kind, including all tools and implements used in connection therewith, which are now or which may hereafter, during the currency of this mortgage, be brought upon the said lands or into any of the buildings thereon, including all machinery used or to be used in the manufacture of cement and plant and tools connected therewith. . . . The dredge at Raven Lake, the machinery, tools, etc., to be deemed fixtures for

the purpose of this mortgage, whether the same shall be actually affixed to the said lands or buildings or not."

The 23rd and 24th clauses read as follows: "And it is further hereby declared and agreed, for the purpose of this mortgage security, that all machinery, plant, and personal property of the company are to be considered fixtures to the realty. And it is expressly understood and agreed that this mortgage is not to be registered as a bill of sale or chattel mortgage. Provided and it is hereby declared that the company may at all times, so long as there is no default in payment of principal or interest on the said bonds or otherwise hereunder, sell and dispose of its manufactured products in the ordinary course of business, free from the lien of this mortgage."

Each bond, a copy of which is set forth in the mortgage, contains this clause: "This bond is one of a series amounting in the aggregate to \$50,000, and is secured by a mortgage duly executed according to law conveying to the National Trust Company Limited as trustee all the present and future real and personal properties, rights, franchises, and powers of the Raven Lake Portland Cement Company Limited, as by reference to the said mortgage will more fully appear; the nature of the security, the rights of the holders of the bonds secured by it, and the terms of the trust appear by the said mortgage, to which reference is hereby expressly directed, and which terms are made a part of this bond."

The mortgage contains the usual provisions for redemption, and that until default the mortgagors shall be permitted "to possess, operate, manage, use, and enjoy the mortgaged premises, and to take and use the rents, incomes, profits, and issues thereof, in the same manner and to the same extent as if these presents had not been executed."

It also contains elaborate provisions enabling the mortgagee, upon default, to take possession and operate or sell the mortgaged premises.

The mortgage was duly registered against the lands covered thereby, but was not filed as a chattel mortgage, nor was anything done to comply with secs. 2, 3, or 23 of the Bills of Sale and Chattel Mortgage Act, as from the beginning the plaintiffs

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assumed that the provisions of that Act did not apply to the mortgage.

On the 14th September, 1907, the company made a general assignment for the benefit of its creditors to Henry R. Morton, who entered into possession as assignee, and proceeded to realise upon the personal estate of the company.

By order dated the 20th September, 1907, made under the Dominion Winding-up Act, the company was declared to be insolvent and ordered to be wound up, the defendant appointed provisional liquidator, and a reference directed to Mr. McAndrew, an Official Referee, to appoint a permanent liquidator, and to take all necessary proceedings for and in connection with the winding-up of the company. On the 30th November, 1907, the defendant was appointed permanent liquidator.

The appointment of liquidator having superseded that of the assignee, the former took possession of all the assets of the company, and proceeded to convert the same into money and to collect outstanding accounts and generally to administer the affairs of the company.

By the 8th September, 1909 (the date of the liquidator's statement of receipts and disbursements), the defendant had apparently realised upon all the convertible assets of the company; and, so far as I can judge from the statement, those assets consisted chiefly of manufactured cement, sacks for cement, coal, book-accounts, and cash received from the assignee as proceeds of goods sold and book-debts collected, before he handed the estate over to the defendant. It does not appear that machinery or anything in the nature of fixtures was realised upon by the defendant.

By letter of the 9th November, 1907, the plaintiff gave the defendant notice of the mortgage, stating that it covered all the property of the company, and was in default, but no steps were taken to recover the goods and chattels then in the defendant's possession, or their proceeds, till October, 1909, when the plaintiff served a notice, in the winding-up proceedings, claiming all the proceeds of the assets of the company realised by the defendant as liquidator, and all other assets (if any) which may be unrealised in the hands of the liquidator, upon the ground



that all such assets belonged to the plaintiff by virtue of the above-recited mortgage.

Nothing appears to have been done under this notice until the 28th September, 1910, when joint objections to the plaintiff's claim were filed and served by the defendant and the Imperial Plaster Company Limited, the latter "on behalf of them selves and all other creditors of the Raven Lake Portland Cement Company Limited," upon the ground, among others, that the mortgage was void for non-compliance with the Bills of Sale and Chattel Mortgage Act, and that the assets were not covered by the mortgage. Instead of adjudicating upon the claim and the objections thereto, the learned Referee, on the 3rd November, 1910, granted leave to issue a writ and prosecute an action against the defendant "in respect of goods and chattels and book-debts and choses in action formerly belonging to the Raven Lake Portland Cement Company Limited, or the proceeds thereof, claimed by the National Trust Company Limited."

This action was accordingly brought, but it is to be observed that the other contestant, the Imperial Plaster Company Limited, was neither made a party to the action, nor was its objection adjudicated upon by the Referee.

An application was made to the Master in Chambers by the defendant to have that company added as a party defendant, but the motion was refused, and the refusal was sustained on appeal, without prejudice to an application being made to the trial Judge, if it should appear to him that the proposed defendant is a necessary party to enable him to adjudicate upon the title to the money in question.

The statement of claim sets forth the mortgage, alleges default and non-payment, and charges that, notwithstanding the plaintiff's rights under the mortgage, the defendant took possession of certain goods and chattels, the property of the said company and subject to the plaintiff's mortgage, and sold the same, and also collected certain book-debts and choses in action, the property of the said company, and wrongfully converted the same to its own use, and refused to deliver the same or account for the proceeds thereof to the plaintiff; and the plaintiff claims

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an account of the same, or, in the alternative, damages for conversion of the said goods, chattels, and book-accounts.

The defendant pleads the winding-up proceedings, disclaims any personal right or interest in the property, denies unlawful conversion, submits that the Imperial Plaster Company Limited, on behalf of itself and all other creditors, should be added as a party defendant, and repeats the objections to the plaintiff's claim set forth in the notice of contestation above referred to.

The following questions arise for determination:—

(1) Does the mortgage bind the goods and chattels in question notwithstanding the provisions of the Bills of Sale and Chattel Mortgage Act?

(2) Does the mortgage bind the book-accounts in question, or any of them?

(3) Is the defendant, as liquidator, entitled to contest the plaintiff's claim on the ground that the provisions of the Bills of Sale and Chattel Mortgage Act were not complied with?

(4) If the defendant is not so entitled, should the Imperial Plaster Company Limited be added as a party defendant?

Upon the first question, counsel for the plaintiff submits that the mortgage creates a floating security, and as such extends to all personal property of the company, whether existing at the date of the mortgage or subsequently acquired, and relies upon the decision in *Johnston v. Wade* (1908), 17 O.L.R. 372, to support his argument that the provisions of the Bills of Sale and Chattel Mortgage Act are not applicable to this mortgage.

In that case there was not, as in this case, a mortgage to secure bonds; but the bonds, upon their face and in the conditions endorsed upon them (see p. 390), declared that all the company's "property, real and personal, rights, powers, and assets of every kind and description, present and future, including its uncalled capital," were charged with the payment of the bonds. The decision in that case was, that such bonds, issued pursuant to a by-law passed under the provisions of the Companies Act, then R.S.O. 1897, ch. 191, sec. 49, were not mortgages of goods and chattels of an incorporated company within the meaning of the Bills of Sale and Chattel Mortgage Act, and were not, therefore, void as against the defendant, the assignee of

the company for the benefit of creditors, because not registered under the provisions of that Act. After reviewing the authorities in England which hold that such debentures need not be registered under the English Bills of Sale Act in order to be effective against other creditors, and referring to the language of sec. 2 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1897, ch. 148, the Chief Justice of Ontario (p. 386) observes: "The words 'mortgage or conveyance intended to operate as a mortgage of goods and chattels' describe instruments of a well-known character. They do not convey the idea of debentures of the kind in question here, which pass no property in the goods and chattels to the holder, and confer upon him no right to take possession of them or interfere with them in any way, except through the interposition of the Court. It seems plain that such an instrument was not within the meaning of the Act or in the mind of its framers, as it stood prior to the passing of sec. 23. That section, as amended by 4 Edw. VII. ch. 10, sec. 36, provides that 'in the case of a mortgage or conveyance of goods and chattels of any incorporated company made to a bondholder or bondholders or to a trustee or trustees for the purpose of securing the bonds or debentures of such company,' the affidavit of *bona fides* may be made as therein prescribed. Here again the difficulty presents itself that the section applies only to a mortgage or conveyance of goods and chattels. And on its face it seems to exclude a bond or debenture simply. It deals with the case of a mortgage or conveyance made for the purpose of securing the bonds or debentures of a company; and enacts (amongst other things) that the affidavit may be made by the mortgagee or one of the mortgagees, all which seems quite inapplicable to bonds or debentures by themselves." Mr. Justice Osler, at p. 388, says: "Section 23 of the Act shews how far the Legislature intended to go in dealing with instruments for securing the bonds or debentures of a company. The only instruments of that class which are required to be registered are mortgages or conveyances of goods and chattels made to a bondholder or trustee for the purpose of securing the bonds or debentures of the company—instruments, as I understand the section, of the same character as those men-

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tioned in other sections of the Act, something quite different from the security by way of floating charge which the Companies Act enables a company to create by the bonds themselves." Mr. Justice Meredith, at p. 390, says: "There was no mortgage given for securing payment of these bonds, but they, upon their face and in the conditions endorsed on them, declared that all the company's 'property, real and personal, rights, powers, and assets of every kind and description, present and future, including its uncalled capital,' were charged with the payment of the bonds. That the bonds are not mortgages, or conveyances intended to operate as mortgages, of goods and chattels, within the provisions of the Bills of Sale and Chattel Mortgage Act, I cannot but think plain: they are neither in form nor in substance such a mortgage. Under them no title to the property in, or right to possession of, the chattels passed to the bondholders: a charge upon the chattels and other the property of the company was created, giving them priority of payment out of the assets of the company."

The validity and effect of what is called a "floating charge" on the property, both present and future, of a company, has been the subject of much judicial consideration in England. The cases are collected and discussed in Palmer's Company Law, 9th ed., pp. 307-311, where it is pointed out that it has been well-settled by the authorities that a floating charge is valid as against execution and general creditors, whether in a winding-up or otherwise, and retains its floating character, unless otherwise agreed, until a receiver is appointed or a winding-up commences.

As to the injustice to subsequent execution creditors arising from the nature of a floating security as defined by the authorities, see observations of Buckley, J., in *In re London Pressed Hinge Co.*, [1905] 1 Ch. 576, at p. 583; also the dissenting judgment of Garrow, J.A., in *Johnston v. Wade*, 17 O.L.R. at p. 392 *et seq.*

The English Companies Act, 1908, sec. 93, providing for registration of floating charges and declaring them void as against creditors unless registered, would appear to remove the danger of injustice to other creditors, in England; and it may be



that our statute-law should also be amended, in view of the holding in *Johnston v. Wade*, by declaring them void against creditors unless registered under sec. 78 of the Ontario Companies Act, 1907.

As pointed out by the Chief Justice of Ontario, in *Johnston v. Wade*, at p. 386, the English cases, "turning as they do upon the terms of legislation which is not the same as our provincial legislation, afford but little assistance, and in the last analysis we must have recourse to the language of the Acts of our own Legislature;" and the judgment in that case is clearly based on the conclusion that a debenture on its face charging the property of a company with its payment was not a "mortgage or conveyance intended to operate as a mortgage of goods and chattels," within the meaning or contemplation of our Bills of Sale and Chattel Mortgage Act.

That case is, therefore, differentiated from this case by the fact that in this case the bonds do not create the charge, but a mortgage is given which creates the charge in favour of a trustee for the bondholders; and, although it embraces the company's real as well as its personal property, I think that, so far as it purports to charge personal property, it is clearly a "mortgage or conveyance intended to operate as a mortgage of goods and chattels," within the meaning of secs. 2 and 23 of our Bills of Sale and Chattel Mortgage Act; and, not having been accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged, and not having been registered as a chattel mortgage, is, as such, under sec. 5 of the Act, "absolutely null and void as against creditors of the mortgagor."

As a chattel mortgage, it was also void *ab initio* as against creditors, according to the view of the late Chief Justice Strong in *Clarkson v. McMaster & Co.* (1895), 25 S.C.R. 96, at pp. 105-6, by reason of the agreement that it should not be registered under the Bills of Sale and Chattel Mortgage Act.

Then, as to the book-debts, it is well settled that they are not within the Bills of Sale and Chattel Mortgage Act, and that a transfer of them does not require registration: *Kitching v. Hicks*

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(1884), 6 O.R. 739; *Tailby v. Official Receiver* (1888), 13 App. Cas. 523; *Thibaudeau v. Paul* (1894), 26 O.R. 385.

While the mortgage in question does not specifically mention present or future book-debts, I think the language "undertakings . . . together with . . . incomes, and sources of money, rights, privileges . . . held or enjoyed by it now or at any time prior to the full payment," etc., is sufficiently comprehensive to create an equitable charge on present and future book-debts. In *Re Perth Flax and Cordage Co.* (1909), 13 O.W.R. 1140, where the language of the chattel mortgage was "all property, real and personal, that shall hereafter be acquired and owned by the company," it was held that these words were amply sufficient to include future book-debts. A charge created by such general language as that employed in this mortgage attaches, I think, to the subject charged, in the varying condition it happens to be from time to time. See *Governments Stock and Other Securities Investment Co. v. Manila R.W. Co.*, [1897] A.C. 81, at p. 86; and Buckley's Companies Acts, 9th ed., pp. 230, 231.

I am of opinion, therefore, that as to any book-debts that were unpaid at the date of the assignment by the company, the plaintiff is entitled to recover the amount that was realised therefrom by the assignee or the defendant; and that the fact that no notice of the charge was given by the plaintiff to the debtors does not, as argued by Mr. Laidlaw, alter that right. Upon this point, *Thibaudeau v. Paul* (*supra*), *Re Perth Flax and Cordage Co.* (*supra*), and *Eby-Blain Co. v. Montreal Packing Co.* (1908), 17 O.L.R. 292, are, I think, conclusive.

The question of the right of the defendant as liquidator to contest the plaintiff's claim under the mortgage, and to hold the proceeds of the chattel property for the benefit of the creditors, has given me much trouble; but I have arrived at the conclusion that the defendant has that right, and that it is not necessary, for the purpose of adjudicating upon the title to the fund in question, to add the Imperial Plaster Company as a defendant. Under sec. 33 of the Winding-up Act, the liquidator, upon his appointment, "shall take into his custody or under his control, all the property, effects and choses in action to which

the company is or appears to be entitled." Having done this, further general duties are, as stated in Palmer's Company Law, 9th ed., p. 395, "to make out the requisite lists of contributories and of creditors, to have disputed cases adjudicated upon, to realise the assets, and to apply the proceeds in payment of the company's debts and liabilities, in due course of administration, and, having done that, to divide any surplus amongst the contributories, and to adjust their rights."

While the title of the estate of the company does not, under the Act, vest in the liquidator, it must clearly be his duty, as an officer of the Court, when he has in his custody property to which the company appears to be entitled, to protect that property for the benefit of the creditors who may be interested therein. Now, when the defendant, as liquidator, took possession of the property in question, which was then in the possession of the company's assignee for creditors, it was property to which, within the meaning of sec. 33, the company or its assignee for creditors "appeared to be entitled."

Had the liquidator given up this property or its proceeds, either when notified of the plaintiff's mortgage or when the property was demanded, without submitting to the Court the claim on behalf of creditors to the effect that the plaintiff's mortgage was void as against them, the liquidator would, I think, have committed a gross breach of duty. When the claim was presented, by the plaintiff, the liquidator joined with a creditor on behalf of all other creditors of the company in contesting it, under secs. 85 to 90 of the Act. Instead of submitting to a summary disposition of the matter before the Official Referee, the plaintiff elected, upon leave of the Court, to bring this action against the liquidator only.

In *Re Canadian Camera and Optical Co.* (1901), 2 O.L.R. 677, at p. 679, Street, J., observes: "It is necessary to bear in mind the position in which a liquidator stands in a compulsory winding-up, viz., that, while in no sense an assignee for value of the company, yet he stands for the creditors of the company, and is entitled to enforce their rights, because their right to prosecute actions themselves against the company and to recover their claims directly out of the property of the company is taken away by the Winding-up Act."

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Being, therefore, from the beginning, *primâ facie* lawfully in possession of the property in question, as an officer of the Court, and being charged with the duty of applying the proceeds in payment of the company's creditors in due course of administration, I hold that the defendant is entitled, in right of the creditors represented by it as liquidator, to contest in this action the validity of the plaintiff's mortgage.

Under the circumstances found in this case, the liquidator is, I think, entitled to maintain in defence of the action the superior claim of the creditors whom it represents.

Discussing the defence of *jus tertii*, it is stated in Clerk & Lindsell on Torts, 3rd ed., p. 252, that, "if the plaintiff makes out a good *primâ facie* title by possession or otherwise, the defendant must in the first place impeach that title by shewing that there is a better right in some one else. That better right may be in himself or in some person under whose authority he is acting, or under whom he claims, and in such a case he clearly has a good defence, for a man cannot be guilty of trespass or conversion in respect of goods to the possession of which he is entitled."

Here the defendant's position is strengthened by the fact that, at the time of the action, the *primâ facie* title by possession was in the defendant. See, further, as to defence of title of third party, *Richards v. Jenkins* (1886), 17 Q.B.D. 544, affirmed in (1887), 18 Q.B.D. 451.

Judgment will be in favour of the plaintiff for payment by the defendant of all money realised from book-debts outstanding and unpaid at the date of the assignment, the 14th September, 1907, but dismissing the balance of the plaintiff's claim, and declaring that the mortgage was as a chattel mortgage void as against the creditors of the company. No costs of action to either party, but the defendant's costs will be paid out of the balance of the fund, as between solicitor and client.

If the parties cannot agree upon the amount to be paid to the plaintiff, there will be a reference to the Master in Ordinary, with costs of such reference reserved until after the Master's report.



[MEREDITH, C.J.C.P.]

## TOWNSEND V. NORTHERN CROWN BANK.

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*Banks and Banking—Securities Taken by Bank under sec. 90 of Bank Act—Securities upon Sawed Lumber—Wholesale Dealer—"Products of the Forest"—"And the Products thereof"—Bank Act, sec. 88(1)—Assignment for Benefit of Creditors—Securities Given within Sixty Days—Continuation of Former Securities—Assignment of Building Contracts—Lumber Used in Building—Assignment of Book-debts.*

The words "and the products thereof," in sub-sec. 2 of sec. 74 of the Bank Act, 53 Vict. ch. 31 (now, with some immaterial changes, sub-sec. 1 of sec. 88 of R.S.C. 1906, ch. 29), apply to all the articles previously mentioned in the sub-section, and, therefore, apply to the products of the forest.

*Dictum* of Hall, J., in *Molsons Bank v. Beaudry* (1901), Q.R. 11 K.B. 212, approved.

*Semble*, that sawed lumber is a product of the forest, within the meaning of the sub-section.

*Held*, upon the evidence, that B. was a wholesale dealer in lumber, and, therefore, a person from whom securities upon lumber could lawfully be taken by the bank, under the sub-section.

*Held*, also, upon the evidence, that, although the security under which the bank claimed was given less than sixty days before the making of an assignment by B. to the plaintiff for the benefit of his creditors, it was a continuation of a former security of the like character held by the bank for the indebtedness, and was entitled to prevail against the assignment.

*Held*, also, that doors and window sashes and the like, manufactured from lumber upon which the bank held security, were products of the lumber covered by the securities.

Some of the lumber covered by the securities was used by B. in the erection of buildings:—

*Held*, that, so far as the money payable under the building contracts assigned to the bank represented the lumber so used, the bank were entitled to it.

*Held*, also, that the bank's claim to book-debts assigned by B. could not prevail against the assignment to the plaintiff.

THE plaintiff, the assignee for the benefit of creditors of Joseph E. Brethour, a builder, contractor, and dealer in lumber, brought this action to set aside certain securities given by Brethour to the defendants to secure his indebtedness to them.

June 14, 1911. The action was tried before MEREDITH, C.J.C.P., without a jury, at Toronto.

W. Laidlaw, K.C., for the plaintiff.

F. Arnoldi, K.C., for the defendants.

April 18, 1912. MEREDITH, C.J.:—The securities which are attacked are securities taken by the defendants under sec.

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90\* of the Bank Act, R.S.C. 1906, ch. 29, and assignments by Brethour of moneys payable to him under building contracts which he had entered into, and book-debts, and these securities were given within sixty days before the making of the assignment; and the plaintiff attacks them on several grounds.

The securities taken under sec. 90 of the Bank Act are attacked on two grounds.

It was contended that Brethour was not a person from whom securities upon lumber could lawfully be taken, because, as is said, he was a builder, and not a wholesale dealer in lumber.† The evidence does not support this contention, but shews that part of the business which Brethour carried on was that of a wholesale dealer in lumber.

It also contended that sawn lumber is not a product of the forest, within the meaning of sec. 88.

In support of this contention *Molsons Bank v. Beaudry* (1901), Q.R. 11 K.B. 212, was cited. The opinion of the Chief Justice (Sir Alexander Lacoste) in that case, no doubt, supports the contention. Hall, J., however, differed from the Chief Justice, and the other member of the Court (Wurtele, J.) expressed no opinion on the point. The question was not necessary for the decision, as the Court was unanimous in affirming

\*90. The bank shall not acquire or hold any warehouse receipt or bill of lading, or any such security as aforesaid, to secure the payment of any bill, note, debt, or liability, unless such bill, note, debt or liability is negotiated or contracted,—

(a) at the time of the acquisition thereof by the bank; or,

(b) upon the written promise or agreement that such warehouse receipt or bill of lading or security would be given to the bank;

Provided that such bill, note, debt, or liability may be renewed, or the time for the payment thereof extended, without affecting any such security.

2. The bank may,—

(a) On shipment of any goods, wares and merchandise for which it holds a warehouse receipt, or any such security as aforesaid, surrender such receipt or security and receive a bill of lading in exchange thereof; or,

(b) on the receipt of any goods, wares and merchandise for which it holds a bill of lading, or any such security as aforesaid, surrender such bill of lading or security, store the goods, wares and merchandise, and take a warehouse receipt therefor, or ship the goods, wares and merchandise, or part of them, and take another bill of lading therefor.

†Section 88, sub-sec. 1, of the Bank Act, R.S.C. 1906, ch. 29, provides: The bank may lend money to any wholesale purchaser or shipper of or dealer in products of agriculture, the forest, quarry and mine, or the sea, lakes and rivers, or to any wholesale purchaser or shipper of or dealer in live stock or dead stock and the products thereof, upon the security of such products, or of such live or dead stock and the products thereof.

on other grounds the judgment that had been given against the plaintiffs.

The provision of the Bank Act then under consideration was sub-sec. 2 of sec. 74 of 53 Vict. ch. 31, which reads as follows: "2. The bank may also lend money to any wholesale purchaser or shipper of products of agriculture, the forest and mine, or the sea, lakes and rivers, or to any wholesale purchaser or shipper of live stock or dead stock, and the products thereof, upon the security of such products, or of such live stock or dead stock, and the products thereof." That sub-section was repealed by sec. 17 of 63 & 64 Vict. ch. 26, and re-enacted, with some changes that are not material to the present inquiry; and the substituted sub-section appears in R.S.C. 1906, ch. 29, as sub-sec. 1 of sec. 88.

In my view, the construction placed by Hall, J., on sec. 74, was the correct one. In my opinion, the words "and the products thereof," in the fourth and fifth lines, apply to all the articles previously mentioned in the sub-section, and, therefore, to the products of the forest, and the words "the products thereof," in the last line, apply as well to the products mentioned in the earlier part of the sub-section as to the products of live stock and dead stock.

Being of this opinion, it is unnecessary to express an opinion as to whether sawn lumber is a product of the forest, within the meaning of the sub-section; but I am inclined to think that it is.

It is further contended that, as the security under which the defendants claim was given less than sixty days before the making of the assignment, it cannot prevail against the assignment. That security was, however, but a continuation of a former security of the like character held by the defendants for the indebtedness; and this contention, therefore, fails.

Some of the lumber upon which the defendants held security was manufactured into doors and window sashes and the like, and these products of the lumber are covered by the securities: R.S.C. 1906, ch. 29, secs. 88, 89.

None of the other articles covered by the securities are within sec. 88 of the Revised Act; and the securities do not, therefore, extend to them.

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Some of the lumber covered by the securities was used by Brethour in the erection of buildings; and, as far as the money payable under the building contracts assigned to the defendants represents the lumber so used, they are entitled to it.

The claim of the defendants to the book-debts cannot be supported; and, indeed, according to my recollection of what took place at the trial, it was abandoned.

If the parties cannot agree as to it, there will be a reference to the Master in Ordinary to determine what part of Brethour's stock in trade at the time of the assignment, not being lumber, was the product of lumber covered by the defendants' securities, and what part, if any, of the money payable under the building contracts assigned represented lumber or the products of lumber covered by those securities.

As success is divided, there will be no costs to either party.

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[DIVISIONAL COURT.]

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April 18

## RE DENTON.

*Will—Construction—Gift to Brothers and Sisters—Death of Sister between Date of Will and Death of Testator—Right of Children of Deceased Sister as Secondary Legatees.*

*Held*, reversing the judgment of RIDDELL, J., 25 O.L.R. 505, upon one of the questions arising upon the will, that the children of the sister who died before the testator, but after the date of the will, were entitled to her share of the "remainder" under clauses 7 and 8 of the will.  
Review of the authorities.

APPEAL by J. H. Dickenson, representative of Naomi Dickenson, deceased, from the order of RIDDELL, J., 25 O.L.R. 505, upon one of the question submitted as to the construction of the will of John M. Denton, deceased.

April 3. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

*T. G. Meredith*, K.C., for the appellant. The question for decision arises under the 7th and 8th clauses of the will, and is, whether or not the children of Naomi Dickenson, who died after the date of the will, but predeceased the testator, are entitled to share in the remainder of the fund formed under clause 7—in



other words, whether the gift under clause 8 is substitutionary or substantive. The learned Judge in the Court below held that the gift was substitutionary only, and accordingly excluded the children of Naomi, considering that he was bound by the principles and authorities cited by him, although the contrary view appeared to him to be more agreeable to common sense. The law is stated in *Theobald on Wills*, 7th ed., p. 671, and it is submitted that the appellant's case is supported by the principles there laid down, which are not affected by the cases cited on behalf of the respondents. In *Thornhill v. Thornhill* (1819), 4 Madd. 377, relied on by the learned Judge, the language is not the same as here, and that case has been disapproved of in *Smith v. Smith* (1837), 8 Sim. 353, *per* Shadwell, V.-C., at p. 357. In *re Potter's Trust* (1869), L.R. 8 Eq. 52, which the learned Judge says is explained in *In re Hotchkiss's Trusts* (1869), L.R. 8 Eq. 643, is in our favour and is good law to-day, and the appellant's case is even stronger. In *re Hannam*, [1897] 2 Ch. 39, has been referred to as against our contention, but falls far short of justifying such a conclusion. [MIDDLETON, J., referred to *Re Fleming* (1904), 7 O.L.R. 651.] Reference was made to *Cort v. Winder* (1844), 1 Coll. 320, and to *Loring v. Thomas* (1861), 1 Dr. & Sm. 497, where *Christopherson v. Naylor* (1816), 1 Mer. 320, is distinguished; also to *In re Woolrich* (1879), 11 Ch. D. 663. The appellant relies on *Loring v. Thomas*, which has never been disapproved, as giving the principle on which this case should be decided.

*M. D. Fraser*, K.C., for the beneficiaries under the will other than Naomi Dickenson, relied upon the judgment of Riddell, J., and the cases there cited, and the principle laid down in the line of authorities from *Christopherson v. Naylor*, in 1816, to *In re Hannam*, in 1897, as shewing that where the gift is, as here, by way of substitution, the children of a person predeceasing the testator are excluded. He referred to *Re Fleming*, *supra*; *Re Williams* (1903), 5 O.L.R. 345; *In re Clark* (1904), 8 O.L.R. 599. In *re Potter's Trust*, *supra*, on which the appellant relies, cannot be treated as a binding decision, and James, V.-C., discussing that case in *In re Hotchkiss's Trusts*, *supra*, holds that *Christopherson v. Naylor* is still an authority. It may be ad-

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mitted that the appellant's case appeals to sympathetic feeling, but the law is the other way.

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*Joseph Montgomery*, for the executor, took no part in the argument, but stated that his client would not be sorry if what had been called the "common sense" view of the case should prevail.

*Meredith*, in reply, argued that *Loring v. Thomas* covered the case, and had not been overruled. He referred to *In re Metcalfe*, [1909] 1 Ch. 424, in which the *Loring* case was followed.

April 18. BOYD, C.:—The 7th and 8th clauses of the will are these:—

(7) After the death of my wife to sell property and pay to sister Naomi and to Mary \$500 and to divide the remainder equally amongst all my brothers and sisters, including Naomi and Mary.

(8) Should any of my brothers or sisters die before the final division of my estate leaving lawful issue then and in such case I desire that the share which such deceased brother or sister would have been entitled (to) if living shall be divided equally amongst the children of such deceased brother or sister so that such child or children shall take the portion which his or her or their parent would have been entitled (to) if living.

Upon questions submitted to the Court touching the proper construction of John M. Denton's will, the fifth one was this: Are the children of Naomi entitled to share, under the provisions of clause 8, in the remainder of the fund formed under clause 7 of the will?

The Judge's answer is that these children are excluded. From this the present appeal is lodged.

The important dates are these. The will of the testator was dated and made the 24th June, 1889. The sister of the testator, Naomi, died in 1892, leaving children. The testator died in 1896. His widow died in 1910. At that time in 1910, his estate became finally divisible upon the death of the life-tenant. Naomi died before this final division; she also died before the testator; but the important point which appears to have been

passed by unconsidered is, that she was alive at the date of the will, and formed then one of the class capable of sharing in the residue, when it should fall to be divided. The learned Judge, applying the solvent of "common sense," thought the testator intended to benefit the children of Naomi, but was compelled by authority to decide the other way. But, bearing in mind the cardinal fact that the sister was alive at the date of the will, there appears to be comparative concord in the later case-law in favour of the bequest to the children being well and legally bestowed.

Grant, M.R., in *Christopherson v. Naylor*, 1 Mer. 320 (1816), laid down the proper method of inquiry. Who are the primary legatees? Who are capable of taking in the first place by the terms of the will? Having found these, then the representatives or issue of these are by the will made to stand as substitutes in place of the original legatee who had died. Whether the time of death be before the death of the testator or the tenant for life or the period of distribution does not matter, so long as you find the primary legatee having capacity to take named in the will. This was in 1816: and in 1843 an accurate Judge summarised the state of decision on this point in *Gray v. Garman* (1843), 2 Hare 268: "It has, indeed, been made a question, whether the capacity of the primary legatee (at the date of the will) to take the legacy was alone sufficient, whether such legatee must not survive the testator, become a legatee *in esse*, and not have been a legatee *in posse* only to entitle his issue to claim in substitution . . . But later cases appear to sanction a more liberal, though still a literal, construction of language like that I am considering. And it has been held, that the issue of a person primarily pointed out as the object of a testator's bounty, and living at the date of the will, may take in substitution for that party dying in the lifetime of the testator" (citing cases); and the Vice-Chancellor (Wigram) ends by saying—"A construction which is certainly fortified by very important analogies:" p. 271.

The gloss of Sir John Romilly in *Ive v. King* (1852), 16 Beav. 46, at p. 53, cited in the judgment below, 25 O.L.R. at p. 511, and founded upon the cases he refers to, appears to be

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too wide: as *Coulthurst v. Carter* (1852), 15 Beav. 421, was a case where the parent was dead at the date of the will; so was *Waugh v. Waugh* (1833), 2 My. & K. 41; and so was *Peel v. Callow* (1838), 9 Sim. 372; and the last case cited by the Master of the Rolls, Romilly, *Christopherson v. Naylor*, I have already referred to as being on the same state of facts. *Congreve v. Palmer* (1852), 16 Beav. 435, was in like manner a case where the sister was dead at the date of the will, and had, therefore, no capacity to take and did not take by the terms of the will.

*In re Potter's Trust*, L.R. 8 Eq. 52, is quoted in the judgment under appeal, and Malins, V.-C., there affirms the law to be on reason thus: "Wherever there is a gift to a class, with a gift by substitution to the issue or children of those who shall die, the children take what their parents would have taken if living at the testator's death, without regard to the question whether the parents died before or after the date of the will." That is an unquestioned statement of law, so far as relates to parents dying after the date of the will, but it has provoked controversy as to those who were dead at the date of the will. On this head it seeks to controvert *Christopherson v. Naylor*; but on this branch of the inquiry we have no concern in order to dispose of the present appeal. The controversy is raised in *In re Hotchkiss's Trusts*, L.R. 8 Eq. 643, 650: but the case itself is an express decision that where the gift is to a class of persons living at the date of the will, the children of those who died between the date of the will and the testator are entitled.

*Thornhill v. Thornhill*, 4 Madd. 377, is apparently an off-hand decision of the Vice-Chancellor, who had the reputation of determining without hearing, and is but meagrely reported. The case seems to have turned on the language of the will giving the children the share of the parent; and, as the parent died in the testator's lifetime, he never had a share to transmit to the children; and on this ground it may be supported, and it is so treated by Mr. Theobald: see Theobald on Wills, 7th ed., p. 671. And he distinguishes it from cases where (as in the present will) what is given to the issue is the share or portion which a member of the class would have taken if he had lived, in which the substitution operates as regards a person who dies in the testator's



life but who was alive at the date of the will. *Thornhill v. Thornhill* is approved and followed by North, J., in *In re Han-nam*, [1897] 2 Ch. 39; but it has not otherwise been received with favour; and both cases are any way clearly distinguishable from this case, where the testator's language expressly provides for the case of one dying before getting or being entitled to any share prior to the final distribution.

The point is thus put by Kay, J., in *In re Webster's Estate* (1883), 23 Ch. D. 737, 739: "Where there is a gift to a class and then a substitutionary gift of the share of any one of the class who should die in the lifetime of the testator, no one can take under the substitutionary gift who is not able to predicate that his parent might have been one of the original class, and consequently if the parent was dead at the date of the will, and therefore by no possibility could have taken as one of the original class, his issue are not able to take under the substitutionary gift."

But I favour the construction of this will as one in which the gift is not strictly of substitutionary character, but as presenting two classes of original legatees: one, the primary legatees, the brothers and sisters of the testator who are alive at the time of final distribution after the death of the testator's wife; the other, the secondary legatees, consisting of the issue or the children of any of the primary legatees who may die leaving issue before the period of final distribution. I would adopt and apply the language of Kindersley, V.-C., as used in *Lan-phier v. Buck* (1865), 34 L.J. Ch. 650, 656: "The gift is to two classes of objects, to such nephews and nieces as shall be living at a given time, and to the issue of such nephews and nieces as shall be dead at that time. Is that an original gift to the issue, or a gift by substitution? Clearly an original gift to them. It is true you may say in a sense they are substituted for their parents, because they take the share respectively among them which their parent would, if he had come under the first class, have himself taken, and in that sense (but that is not the accurate and proper sense) you may say that there is a substitution; but it is as much an original gift to the issue of such of the nephews and nieces as shall have died before the

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RE DENTON.    tenant for life" (or the period of distribution) "as it is an original gift to such of the nephews and nieces as shall be living at the death of the tenant for life" (or other fixed period).

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I find no authority preventing us from giving effect to the clear and obvious meaning of the testator, that the children of his sister should take the share intended for their parent had she been alive. The whole field of testamentary interpretation in this regard has been broadened, and, if I may say so, humanised, by the exposition of the subject by the Lords in *Barraclough v. Cooper* (1905), as reported in a note to the case of *In re Lambert*, [1908] 2 Ch. 117, at pp. 121-126. They repudiate any canon of construction beyond the fact that enough is found in the language of the instrument to shew what was the meaning of the testator. And Lord Macnaghten quotes with emphatic approval the words of Vice-Chancellor Kindersley in *Loring v. Thomas*, 1 Dr. & Sm. 510, as follows: "Now, of course the question is one of intention, and it is obvious that in cases of this kind a testator may mean to *include* as objects of his bounty, or he may mean to *exclude*, the issue of the predeceased children. When a testator directs that issue shall represent or stand in the place of or be substituted for a deceased child, and take the share which their parent would have taken if living, he may intend such representation or substitution to apply only to the case of the child dying subsequently to the date of his will and before the time of his own death; or he may mean it to extend also to the case of the child who was already dead at the date of the will. The solution of the question, which of the two he intended, must of course depend on the language he has used in indicating such representation or substitution. He may use language of such restricted import as to be inapplicable to any children but such as are living at the date of the will. But if he uses language so wide and general as to be no less applicable to a predeceased child than to a child living at the date of the will, then the direction as to such representation or substitution must be held to embrace both."

The House of Lords have in effect given their sanction to the vigorous words of James, V.-C., in *Habergham v. Ridehalgh* (1870), L.R. 9 Eq. 395. He says (p. 400): It was con-

tended by Mr. Kay that a gift to A., and a class of persons, is also a gift to a class, and that with regard to that class this rule has been laid down: that in order to determine the class you must take the persons who answer the description at the death of the testator. That implies that where there is a gift to a class, that means a gift to such of the class as shall be living at the death of the testator; and it follows that no one member of the class who may have died in the lifetime of the testator will be entitled. That reasoning is a very good illustration of the process by which in this Court we have established a body of dogma, and developed a whole code of artificial rules, according to which a testator's will is treated as if it were something written in cypher, and incapable of being construed except by those learned persons who have the key of the cypher. Nevertheless, sometimes the Court is enabled to determine questions arising upon wills according to the rules of common sense; either by playing off one rule against another, or by resorting to some general rule of construction which controls the rest." And the Vice-Chancellor proceeds to act accordingly.

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A case of *Re Fleming*, 7 O.L.R. 651, decided by Mr. Justice Street, supports the view taken on this appeal.

I agree with my brother Riddell as to the meaning of the testator; and I do not read the authorities cited as going to interfere with the operation of common sense in the construction of the testator's language.

I rather favour giving costs of this appeal out of the estate.

LATCHFORD, J.:—I agree.

MIDDLETON, J.:—I entirely agree. Lindley, L.J., in *In re Palmer*, [1893] 3 Ch. 369, in dealing with a case where the Judge of first instance had thought that he was precluded by prior decisions from giving effect to the testator's intention, uses words peculiarly apt here (p. 373): "The result in all these cases has been, in my opinion, to miss the intention as expressed, and, unfortunately, to defeat it without sufficient grounds. This line of cases affords a striking illustration of the mischief done by construing one will by paying too much attention to decisions on

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other wills. Rules of law must be attended to; but if in any case the intention of a testator is expressed with sufficient clearness to enable the Court to ascertain it, the Court ought to give effect to it in that case, unless here is some law which compels the Court to ignore it; and the mere fact that in other wills more or less like it other Judges have not been satisfied as to the intentions expressed in them, is not sufficient ground for defeating an intention where the Court holds it to be sufficiently expressed in the particular will which it is called upon to construe."

Quite apart from cases, the language of the testator here admits of no possible doubt. The testator has directed the property to be set apart and held during the lifetime of his wife. Upon the death of the wife, it is then to be divided equally amongst all his brothers and sisters, including Naomi Dickenson, who is expressly named; and the testator then provides that, should any of his brothers or sisters die before the final division of his estate, leaving lawful issue, the share which the deceased brother or sister would have been entitled to, if living, shall go to the children of the deceased brother or sister.

The will as to persons speaks from its date. Naomi died during the testator's lifetime. I can find no warrant for reading into this will a provision which would exclude her children from sharing because she predeceased the testator. This would be clearly contrary to the express intention of the will. The analysis of the cases by my Lord makes it plain that there is no authority compelling us to do violence to the testator's language and frustrate his intention.

*Appeal allowed; costs out of the estate.*

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## [DIVISIONAL COURT.]

## UNDERWOOD V. COX.

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*Contract—Family Settlement—Unfounded Claims—Fraud and Misrepresentation—Inducement for Executing Document—Threats—Absence of Independent Advice—Evidence—Threatening Letter Written “without Prejudice” pendente Lite—Admissibility.*

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The defendant, who was the principal beneficiary under the will of her father, made an agreement with the plaintiffs, her brother and sister, and with another sister, by which she covenanted to pay over to them the greater part of what she was to receive under the will. One of the plaintiffs had opposed the granting of probate of the will, and had filed a *caveat*; and the agreement purported to be by way of compromise or settlement of the plaintiffs' claims to the estate:—

*Held*, in an action to enforce the covenant, that, upon the evidence, the plaintiffs had no grounds for attacking the disposition of his property made by the father, and that the defendant was in fact induced, by threats made by her brother, one of the plaintiffs, to execute the agreement, without competent independent advice and under pressure of the threats; and, therefore, the agreement was not enforceable.

A letter written to the defendant by her brother above-mentioned, *pendente lite*, and containing veiled threats, though purporting to be written “without prejudice,” was admitted as evidence for the defendant.

*Pirie v. Wyld* (1886), 11 O.R. 422, followed.

Judgment of KELLY, J., reversed.

ACTION to recover \$964.70 and interest upon a covenant in an agreement.

January 17, 18, 19, and 26. The action was tried before KELLY, J., without a jury, at Toronto.

*R. U. McPherson* and *J. W. McCullough*, for the plaintiffs.

*G. Waldron*, for the defendant.

February 28. KELLY, J.:—This action is brought by William J. Underwood and his sister, Catharine Laurie, against their sister, Jane Cox, for payment of \$964.70 and interest, claimed as their two-thirds share of an amount agreed by the defendant to be paid to the plaintiffs and another sister, Mary Ann Cox, by an agreement dated the 5th May, 1910.

The defence set up is, that the defendant was induced to sign the agreement by the misrepresentation, fraud, intimidation, duress, and undue influence of the plaintiff Underwood and Joseph Laurie, husband of the plaintiff Laurie, and that she signed it without knowing its contents and without legal advice as to her rights.

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The parties to the agreement are children of Francis Underwood, deceased, who by his will, dated the 2nd August, 1902, and a codicil thereto, dated the 1st March, 1905, gave to Ida Frances Cox, the minor daughter of the defendant, an organ and a mortgage which he held for \$1,000 on the property of the defendant and her husband, and all the rest of his estate to the defendant.

The testator died on the 27th March, 1910; and his executors applied for probate of the will; the plaintiffs and Mary Ann Cox filed a caveat against the issue of probate, alleging that the will was not executed by the testator, or, if so, that it was executed under undue influence and duress, and that he was not of sound mind, memory, and understanding.

The real ground, however, of the plaintiff Underwood's objection to the disposition made by the testator of his estate is found in the claim which he had, or believed he had, against the testator and his estate, arising out of an agreement or understanding between the father and son. Several years prior to his death, the father obtained from the son a conveyance of certain property, at a price much less than its real value, on the promise that, at his death, the son would be given a substantial part of his estate. The son honestly believed that he was entitled to enforce this claim against his father's estate, or to share in the assets of the estate; he also claimed the organ which his father bequeathed to the defendant's minor daughter, and which, the evidence shews, had been at some time looked upon as belonging to him. The claim of the plaintiff Catharine Laurie was, that she had been promised by her father consideration for having nursed and cared for him for a considerable time prior to his death, and that the estate was, therefore, indebted to her. Mary Ann Cox, the other party to the agreement sued on, is not a party to these proceedings; it was stated by the defendant's counsel, during the progress of the trial, that she was not pressing her claim.

On the 4th May, 1910, the plaintiff Underwood, who lives in London, went to the defendant's residence in the township of Markham, and, during an interview of considerable length, proposed a settlement. The defendant's husband, Walter Cox, was

not present; and Underwood, after stating to the defendant why he claimed to be entitled to a settlement, named an amount which would be accepted for the plaintiffs and Mary Ann Cox in full, the terms proposed being exactly those which were afterwards embodied in the agreement sued upon. The defendant, as was natural, said that she wished to talk it over with her husband; and Underwood left the house with the understanding that he would return next day for her answer.

On the 5th May, Underwood, accompanied by Joseph Laurie, husband of the plaintiff Catharine Laurie, returned to the defendant's house, and had a further interview with the defendant and her husband. The proposal made on the day previous was fully and freely talked over and considered by those present, and the defendant and her husband decided to accept it; and it was suggested by the defendant's husband that the plaintiff Underwood draw the agreement to carry out the settlement. This Underwood refused to do. It was then suggested, and, so far as the evidence shews, by the defendant, that Underwood, Walter Cox, and Laurie go to one of the executors, who lived near by, and have him draw the agreement. They went. The executor also refused to draw it, and suggested the parties going to Markham to have it drawn by a solicitor. These same three persons went together to Markham, a distance of five and a half miles, and instructions were given to a solicitor to prepare the agreement, on the terms which had been agreed on at the defendant's house, all three being with the solicitor when the instructions were given.

The plaintiff Underwood and the defendant's husband returned to the defendant's house with the agreement, which, on the way from the solicitor's office, had been signed by Mary Ann Cox.

The defendant did not then read the agreement, but she admits that she understood the proposal for settlement, made by her brother on the 4th, and discussed by the parties assembled at her house on the 5th. There is no doubt, and the defendant admits it, that the agreement is in the exact terms then proposed. Under these circumstances, its not having been read over at the time of its execution is not a ground for re-

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pudiating the agreement: *North British R.W. Co. v. Wood* (1891), 18 Ct. of Sess. Cas. (4th series) 27.

The defendant shewed some hesitation about signing, and the plaintiff Underwood said to her: "Now, Jane, you do not need to sign that paper, and don't sign it unless you feel that you are giving what you feel that I should have; I consider this is a just claim, and if you don't consider so, don't sign that paper." And, further, "You don't have to sign it."

The defendant's husband then said, "What will happen if she don't sign it?" Underwood replied, "We will let it stand on its own merits, will let the case stand on its own merits, and the case will settle itself."

At the trial it was admitted that there was no duress; and there was no evidence of it; but it was attempted to be shewn that there was fraud and misrepresentation on the part of the plaintiff Underwood, and that he had intimidated the defendant and obtained undue influence over her.

The evidence does not satisfy me that these contentions are well founded. I do not find that the plaintiff Underwood or Joseph Laurie made any misrepresentations to or perpetrated any fraud upon the defendant; nor do I think that any fiduciary relationship, or relationship of confidence, existed or was established between these parties such as would justify the assumption of undue influence; nor is there any evidence of intimidation.

The defendant alleged that she was in a weak state of health, that she had no independent advice, and that she was unduly pressed by the plaintiff Underwood, and was hastened into the settlement.

It is true that she was not then in the best of health, but she was not so unwell as not to be able to attend to her household duties, which she was doing unaided at that time, including the preparation of dinner for those who assembled at her house on the 5th May. She was not unduly pressed or hurried into the settlement. When, on the 4th May, she expressed her desire to be given until the following day to consult with her husband, her brother readily consented. She had from some time on the 4th May until the afternoon of the 5th May to confer with her



husband, and obtain other independent advice, had she desired to do so; and I do not find that any circumstances arose which threw the burden on the plaintiffs of doing more than they did. See *Wallis v. Andrews* (1869), 16 Gr. 624, at p. 640.

In *Harrison v. Guest* (1856), 2 Jur. N.S. 911, the Lord Chancellor held the absence of professional advice no objection, when the party dealt with did not occupy a fiduciary relationship. It was also there laid down that the burden of proof is on the party seeking to set aside the transaction to shew that he has been imposed on, and it is not for him to say, "I had no professional advice," unless he can shew that there has been contrivance or management on the part of the person who was dealing with him, and whose transaction is sought to be set aside, to prevent him having that advice.

Nothing has happened in this case to throw that burden on the plaintiffs.

The defendant endeavoured to shew that the plaintiff Underwood had used an incident in her early life as a threat to compel her to make the settlement. I do not find this to have been the fact. The defendant's evidence is, that she did not know if her brother knew of this incident, that he had never mentioned it to her, and when she herself mentioned the subject on the 4th May, she cannot remember his making any reply. Her brother denies having alluded to it.

It was argued on behalf of the defendant that the filing of the caveat was not the proper procedure by which Underwood could establish his claim. He, however, believed that whatever procedure was adopted by his solicitor in London, who prepared the caveat, was the necessary procedure by which to establish his claim.

The settlement was, to my mind, deliberately made; and the fact that one party to it afterwards became dissatisfied with it, is not of itself a sufficient reason for seeking to be relieved from it. In many instances, compromises or settlements are entered into which are at the time not altogether satisfactory to one or other of the parties, but which they, nevertheless, enter into so as to avoid the expense and anxiety attendant on litigation, or

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to settle doubtful claims, or for some such consideration, and the Courts uphold these compromises or settlements.

It is not unusual for a compromise to be effected on the ground that the party making it has a chance of succeeding in it; and, if he *bonâ fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration: *Callisher v. Bischoffsheim* (1870), L. R. 5 Q.B. 449; *Miles v. New Zealand Alford Estate Co.* (1886), 32 Ch.D. 266.

These plaintiffs not only believed that they had a chance of success, but there is nothing in the evidence to shew that their claims were, in their minds, at least, other than honest ones, or that they were otherwise than honestly made. By the agreement sued upon, they and Mary Ann Cox, in consideration of the payment which the defendant agreed to make, released their father's estate from all claims which they had against it, and withdrew, without costs, the caveat.

After a careful consideration of the evidence, I can only conclude that the plaintiffs are entitled to succeed. There will, therefore, be judgment in their favour for the amount prayed for and costs.

The defendant appealed from the judgment of KELLY, J.

April 4. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

G. Waldron, for the defendant, argued that the learned trial Judge erred in the following findings: that the plaintiff Underwood did not make any misrepresentation to the defendant; that his real ground of objection to the will was in the claim which he had against his father's estate; that there was no evidence of intimidation; that no fiduciary relationship or relationship of confidence existed between these parties such as would justify the assumption of undue influence; that the defendant's health was not such as to interfere with her power to contract; that the absence of professional advice was not objectionable; that the plaintiff Underwood had not used an incident in the early life of the defendant as a threat to compel her to make a settlement; that the agreement was deliberately made; that the plaintiffs

believed they had a fair chance of success. Counsel contended, on the contrary, that there was fraud and overreaching on the part of the plaintiff Underwood; that there was a fiduciary relationship or relationship of confidence between the plaintiff Underwood and the defendant; that there was evidence of intimidation; that the plaintiff Underwood did use an incident in the early life of the defendant as a threat to compel her to make a settlement; in fine, that the bargain was not a compromise of a dispute at all, but a surrender by the defendant through fear of Underwood's betrayal of a family secret, and should not be enforced. The learned trial Judge should have admitted in evidence a letter written by the plaintiff Underwood from London in November, 1911. Though written "without prejudice," it was not a privileged document, because it contained threats, and was not written for the purpose of a *bonâ fide* offer of compromise: *Kurtz and Co. v. Spence and Sons* (1888), 58 L.T.R. 438, at p. 441; Phipson on Evidence, p. 211; *Pirie v. Wyld* (1886), 11 O.R. 422. In support of his contentions counsel also referred to the following authorities: *Cadaval v. Collins* (1836), 4 A. & E. 858; *Huguenin v. Baseley* (1807), 14 Ves. 273, at p. 287; *Gordon v. Gordon* (1816), 3 Swanst. 400; *Hoghton v. Hoghton* (1852), 15 Beav. 278; *In re Roberts*, [1905] 1 Ch. 704; *Tennent v. Tennents* (1870), L.R. 2 Sc. & D. 6; *Hartopp v. Hartopp* (1856), 21 Beav. 259; *Ellis v. Barker* (1871), L.R. 7 Ch. 104; *Boyse v. Rossborough* (1856), 6 H.L. C. 2; *Allcord v. Skinner* (1887), 36 Ch. D. 145, at p. 171; *Stapilton v. Stapilton* (1739), 1 Atk. 2; *McCaffrey v. McCaffrey* (1891), 18 A.R. 599; *Trusts and Guarantee Co. v. Hart* (1900), 31 O.R. 414, at p. 420; *Gissing v. T. Eaton Co.* (1911), 25 O.L.R. 50.

*R. U. McPherson* and *J. W. McCulloch*, for the plaintiffs, contended that the learned trial Judge was right in his findings, and that his judgment should be affirmed. They denied that the evidence shewed any fraud or overreaching or intimidation, or that any fiduciary relationship existed between the plaintiff Underwood and the defendant such as would justify the assumption of undue influence. Therefore, the absence of professional advice was no objection: *Harrison v. Guest*, 2 Jur. N.S. 911. The plaintiff Underwood did not use an incident in the

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early life of the defendant as a threat to compel her to make a settlement. The settlement was deliberately made, and the fact that one party afterwards became dissatisfied with it was not a sufficient reason of itself to be relieved from it. The bargain was a fair compromise, as the plaintiffs believed that they had a fair chance of success: *Callisher v. Bischoffsheim*, L.R. 5 Q.B. 449; *Miles v. New Zealand Alford Estate Co.*, 32 Ch. D. 266. The learned trial Judge was right in refusing to admit in evidence the letter of November, 1911, as it was a privileged communication: *Kurtz and Co. v. Spence and Sons*, 58 L.T.R. 438.

*Waldron*, in reply.

April 18. BOYD, C.:—This appears to be a nefarious transaction, though its real import was obscured at the trial by reason of the rejection of evidence. Had the letter written by the plaintiff Underwood to the defendant *pendente lite* been admitted and considered by the learned trial Judge, I do not doubt but that he would have arrived at a conclusion diametrically opposite to that now under appeal. He was impressed favourably with the appearance of the plaintiff Underwood, but his own letter shews to what unworthy means he will stoop to serve his own ends. The dispute falls to be decided (as I take it) mainly, if not entirely, on what occurred during the first interview of one hour between brother and sister (the said parties) on the 4th May, 1910, when he made the claim which was afterwards given legal effect to by the writing under seal which is the foundation of this suit. But to understand the situation it is needful to refer to what is in evidence and to the prior sequence of events.

The first group relates to the plaintiff Underwood's claim of unfair treatment by his father. This claim, vague at best, looms up more largely at the trial than elsewhere. It was not known by or disclosed to the defendant; and, even now, it is difficult to find out coherently any claim from the evidence. But, so far as it has substance, the situation is this, and it rests entirely on the recollection and good faith and credibility of the plaintiff Underwood—with no scrap of writing to assist, but all the writings making against him.



The lot named in the will, N. part of lot 18 (fifty acres) in the 4th of Scarborough, was, the plaintiff Underwood says, originally owned by his mother. She died in 1885, without a will, leaving the father, this son, and four sisters, of whom the youngest, the defendant, Jane, was under age. It is said that the mother intended that the son should get this lot, and it is said that the father got the sisters to sign off their claims, without consideration, in favour of the plaintiff Underwood. It is said that the plaintiff mortgaged for \$500, with which money he went into business, without much success apparently. Then the father asked the son to sell him the lot, and the son wanted for his interest therein \$3,500, but the father would give no more than \$2,000, and this the son took, on the father saying that the son would get a share with the rest of them when he divided—this being taken to mean, “when he died.” The son contradicts himself as to whether the father paid \$2,000 and assumed the mortgage for \$500, or whether the mortgage was to be paid out of the \$2,000. This occurred in 1888. This manner of claim was not explained to the sister when the alleged settlement took place in 1910. He gives it in his evidence in chief thus: “I said I felt I had not got from the estate what I should have got, that my father had not left me what I was promised, what I felt I should have; she said she had nothing to do with that part of it as to what I got or should have got.” “Then I asked her, in view of the circumstances, her knowing how the property was made and got together, and how I stayed at home till I was twenty-three, I felt it was due her to make good the money, as she was evidently the only beneficiary under the will, that I should have a certain amount and that Mary Ann and Catharine should have something.”

To follow the history of this lot after the son conveyed to the father. In 1902, the father called upon Mr. Holmes to draw the papers conveying this lot to his daughter Jane and her husband, Walter Cox, and to draw a mortgage, on the 26th July, 1902, for \$1,000, upon the lot, from the Coxes, payable to the father at the end of fourteen years, with interest at two and a half per cent. This was subject to a first mortgage from the father to George Morgan (probably an executor) for \$1,500.

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Mr. Holmes says that the mortgage was drawn expressly for the purpose of being left to the child (Ida Frances). According to the statement of the plaintiff Underwood, this farm was worth about \$5,000, and they were to give \$4,750 for it; of which \$1,500 was paid by the defendant. There was also the mortgage for \$1,000; and, if it was subject to another mortgage for \$1,500, that would total \$4,000. And the plaintiff omits to tell that his sister Jane relinquished her share in the lot originally when it was conveyed to the plaintiff—worth several hundred dollars. The rest of the sisters got \$2,500 each from the father during his life.

The next group relates to the will of the father.

The father died at the home of the plaintiff Catharine Laurie, on the 27th March, 1910. His will was made on the 2nd August, 1902, pursuant to instructions given to the well-known lawyer Mr. Holmes, who drew it and was one of the subscribing witnesses. He gives to his daughter Mary Ann Cox and her husband the north half of lot 19 in the 4th of Scarborough, being 100 acres. To his daughter Fanny Newell, a small lot containing one-eighth of an acre alongside the north fifty acres of lot 18, conveyed to Jane and her husband. To Frances Cox, daughter of his daughter Jane, he gives the organ and also the mortgage for \$1,000 made by his daughter Jane to the testator, and drawn less than a week before the will.

Nothing is given to his son Richard and daughter Catharine, as he had advanced them a sufficient portion (the plaintiff Underwood's name is not mentioned), and the residue of the estate goes to Jane Cox.

There was a codicil to this, drawn after it because of the death of Fanny Newell on the 1st March, 1905, when the testator was living with his daughter Catharine, whereby the small lot of one-eighth of an acre was given to his daughter Jane, the defendant. This codicil was drawn by Mr. Holmes's partner, Mr. Gregory, and by him also witnessed. The defendant was too ill to attend the funeral, but the plaintiff Underwood was there, and then found out from the Lauries that a will had been made. The matter was talked over with the sister Catharine, and they were disturbed about the way the property was left,

and about Ida the little girl securing the mortgage for \$1,000. The plaintiff bespoke a copy of the will, and returned to his home at London. He writes a letter on the 24th April, 1910, to the executor George Morgan urging the forthcoming of a copy of the will, in which he says: "All the information I have is from the Lauries to the effect the youngest girl (*i.e.*, defendant) in the family and her daughter comes in for the entire estate. And it is my opinion (*sic*) to go thoroughly into the matter before allowing the matter to be settled."

The plaintiff repairs to Mr. Beattie, solicitor in London, and procures the filing of a caveat on the 26th April, 1910, on behalf of the plaintiff and the two sisters Mary and Catharine. It is not clear what he told this solicitor as to the grounds of attack; at p. 122 of the evidence he says: "One of the grounds was his own promise before a witness that I was to have a share in the estate." And there is this further from his examination for discovery: "Q. And your solicitor did not think that would be a ground for setting aside the will? A. I do not think I asked him that. I thought possibly that would be a ground for setting aside the will . . . I did not go into the question of my reasons for the caveat to Jane." However, the caveat does set forth as grounds that the alleged will was not executed by the testator, or, if executed, it was so by means of duress and undue influence exercised over him, and that he was not of sound mind, memory, and understanding. The plaintiff says the caveat was filed because "he felt that he had not got what he felt was just out of the estate."

A warning was given on behalf of the executors on the 27th April that the contestant was to appear within ten days after service, failing which the Court would proceed in the premises: that would allow him till the end of the first week in May to act. Accordingly, on the 3rd May he visited Mr. Gregory, solicitor for the executors, and the caveat was discussed and the will, and he asked information, speaking something of the father and saying the will was not fair. Mr. Gregory informed him that there was no doubt about the validity of the will or codicil or of the capacity of the testator. He and his partner Mr. Holmes had known the testator well for years, and

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the plaintiff admits that he was told emphatically that there was no cause for breaking the will.

The plaintiff had visited his father in 1909, and found him robust and strong-minded, and that was his last visit.

These are the facts, which shew a perfectly hopeless case for attacking the disposition of property made by the testator, either on the grounds set forth in the caveat or upon the vague oral intimation alleged to be given by the testator, a quarter of a century before his death, that he would leave the son something by will. How then does it come that the defendant appeared willing to settle the plaintiffs' claims by paying \$1,400? It is to be noted that Mary makes no claim on the estate and takes no part in this litigation; and, further, that the alleged claim of Catharine for nursing was not in any way referred to before the defendant, it being supposed and believed that she (Catharine) had been paid by the testator all that he had promised to pay her—at so much per week. This apparent family compromise turns out to be really a surrender by the defendant, at the bidding of the plaintiff, because of his knowledge and use of a family secret. That secret may be revealed by the use of the plaintiff's own words in the letter dated "Nov. —, 1911," written to the defendant after he had been examined for discovery in this action:—

"I am going to use what evidence I can get to shew that I had good reasons to enter a caveat against the will. . . . You know that my father was induced to make his will in the way he did just because of that child that Walter declared did not belong to him, and my father told us when he lived with us in Uxbridge that the child did not belong to Walter, and did not look like him, and went so far as to hint pretty loudly who it did belong to, and there are others in Scarborough who will be brought to tell what they know.

"You will remember that I was in Scarborough that day that Walter laid drunk on the side of the road after being up at Markham, and threatened to leave you, and you know his reasons, and he told them to some others in Scarborough. . . . All I want is my rights."

This precious epistle was enclosed in an envelope and



addressed to Mrs. Jane Cox, and marked "personal," with a double injunction, marked on the envelope and written again on a strip of paper, to the post master, "Please see that the enclosed letter is given to no one else but to Mrs. Cox," and the whole put into an envelope addressed to the post master at Malvern. This outside envelope is stamped as of the 24th November at Malvern, and as of the 25th November at London, where it was posted. This letter begins "Dear Sister Jane" and ends "Your Bro. Will," and has at its opening "*Without prejudice.*" The plaintiff has some knowledge of the niceties of law, such as that he should not draw an instrument of which he gets the benefit, and he doubtless thought that this would be a secret missive not to be revealed or used against him in Court. And he hoped, no doubt, that it would work no less efficaciously in writing than if given by hint or word of mouth. But the authorities shew that this kind of letter, containing threats not written for the purpose of a *bonâ fide* offer of compromise, is not within the category of privileged documents.

On grounds of public policy, letters written without prejudice and written *bonâ fide* to induce the settlement of litigation, are not to be used against the party sending them. But, when the letter embodies threats if the offer be not accepted, it is in the interests of justice that such tactics should be exposed, and no privilege protects: *Kurtz and Co. v. Spence and Sons*, 58 L.T.R. 438, 441; Phipson on Evidence, p. 211; *Pirie v. Wyld*, 11 O.R. 422.

A critical point in the case was reached at the beginning of the cross-examination of the plaintiff. I quote: "You said you never made any threats to this woman? A. I never made any threats. Q. You did not make any threats on the 4th or 5th May? A. Oh, no. Q. Or on any other occasion? A. Threats—no, sir." Then counsel calls for the letter, but further questioning is frustrated by the ruling that it was not admissible. Now this letter, when looked at and read on this appeal, is fatal to the plaintiffs' success. The trial Judge, believing the answers made by the plaintiff Underwood, gives judgment in the plaintiffs' favour. But this letter is full of threat and menace of the basest kind; and so his answers must be discredited, for this letter dis-

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closes his threats, and therein stamps him as untruthful, and its contents reveal that he is also unscrupulous.

Leaving Mr. Gregory on the 3rd May, the plaintiff paid his visit to the defendant—and this visiting her was a new thing that had not happened before—on Wednesday the 4th May, 1910. She had heard nothing about the will from the plaintiff or her sisters, but it appears that the solicitor of the executors, Mr. Gregory, had, with the executor Morgan, called on her in the early part of April to see about the details of the estate with a view to obtaining probate. The affidavit of the other executor, Wyper, as to value, was made on the 20th April. Mr. Gregory says that he found her at the time of his visit in a “very frail condition.” She had been married about thirteen years, and had children other than the one who takes under the will the mortgage intended for her by the testator—her grandfather—notwithstanding and perhaps because of his knowledge of the stigma which attached to her birth. The plaintiff, being asked, identified her thus: “Q. And that is the girl that was born as the result of something being up with the mother? A. That is the girl.” The allusion is to the expression used by the mother in giving the scraps which she was able to recollect of this private one hour’s interview with her brother on the 4th May. I quote: “He told me he had stopped the business. . . . He said that I knew why my little girl got the money left to her (*i.e.*, the \$1,000 mortgage). I said, ‘Was it because there was something up with me when I was married?’ ” At this stage of the examination and often afterwards she failed to remember what he said as to that and to other matters germane to it. No one can tell the strain put upon her by the exposure in public Court: she felt tired and faint, and finally collapsed, and the Court adjourned early. It is to be regretted that, on the resumption of the case next morning, she had not been asked to put in writing in Court what she remembered, but this was not done, and she was overwhelmed with varied questions, which, far from helping, only hindered and embarrassed her. On the other hand, the plaintiff answered evasively and “hedged” on the different occasions when his cross-examination was nearing this critical point. As a short sample I put in a

page which exemplifies his manner of answering while being examined for discovery:—

127. Q. You did not tell her the grounds upon which you were going to break the will if she did not give in now? A. No

128. Q. You told her that you were going to fight it? A. Yes.

130. Q. You know the history of the little girl? A. Of the granddaughter?

131. Q. Yes, of your niece? A. I know partly the history of it.

132. Q. Say yes or no? A. If I could tell how children come in every family, I could tell you; I know the child was born.

133. Q. Did you make use of that in talking with your poor, feeble, consumptive sister? A. She is not consumptive.

134. Q. Weak lunged; did you make use of that? A. Her name was mentioned as receiving a thousand dollars, which she should not have. I made use of it in that way, that she got a thousand dollars that the rest of the family should have, I did make use of that.

135. Q. Did you talk with poor Jane about what would happen if you smashed this will which your father had made? A. What would happen?

136. Q. How the property would go if you smashed the will? A. I guess I did.

137. Q. What did you tell her? A. If the will was broken, then we would share and share alike—I think that is what I told her.

138. Q. Did you tell her that your proposition was a little better for you and Mary Ann and Catharine than that? A. I do not think so, because it would not have been.

140. Q. Did you say what would happen to the little girl if the will was broken? A. That that thousand dollars which she was to get would go to the rest of us, yes.

141. Q. Did you play upon the mother's timid horror of publicity? A. I do not think so.

142. Q. Did you play upon the fear of the woman who has made a mis-step and who was your own sister? A. Only as I am mentioning here.

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No one can read the plaintiff's evidence (with the light reflected from this letter) and fail to see that the man knew how to touch the sore sport in his sister's past life.

No one who reads the defendant's evidence (with the light so reflected) can fail to see the cause of her mental disturbance, her distress of mind. She could not collect her senses: she failed to recollect, and that at many critical points, when, if she were an untruthful witness, it would have been simple and easy for her to fabricate favourable responses.

Consider the parties pitted against each other, in the absence of the husband and children and in the seclusion of the farmhouse: he suing as a book-keeper, but giving evidence as an "insurance-solicitor," whose business it was to persuade people, and who had the adroitness and resourcefulness and assurance possessed by a shrewd man in that line of business. She, the youngest of the family, in frail health (as he admits), nervous, without knowledge of affairs, and without advice—burdened, moreover, with a secret, condoned after thirteen years of married life, but now likely to be revealed in all the publicity of an open Court. He takes out a copy of the will and reads it to her: he says he has authority to come down and break the will, and that she had to get on her knees because there was going to be a big storm. Confronted with the last statement, all that the plaintiff can say is, "To the best of my recollection and knowledge I said no such thing."

Again he said (with reference to the farm willed to Mary, which the testator before his death sold and conveyed to her), "The selling of the farm to Mary Ann could break the will." This statement is not contradicted by the plaintiff.

Again he said, "If the will was broken, I would lose everything, and my sisters would come in for the money that was left to me (*i.e.* the residue), and my little child would lose hers . . . He said he had stopped the business. . . . I did not know what a caveat was." To stay all this turmoil and exposure, she was to give up the money in the bank (which turned out to be about \$750) and to pay \$700 besides.

This because, as he said in his letter to Morgan, she and the girl get the entire estate. What was the entire estate given by



the will? As valued by the affidavit of the executor Wyper, as follows:—

Household goods and furniture .....	\$ 10.00
Mortgage to child (to be paid by Mrs. Cox) ..	1,000.00
Cash in bank (reduced by expenses to \$750) .	1,000.00
The small lot to Mrs. Cox, value .....	400.00

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\$2,410.00

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The plaintiff makes grave complaint of the “organ” being given to the child: an old organ, bought, as is proved, by his mother, and, like the land (as he says), intended for him. The mother died in 1885, and the organ of that age was included in the valuation at \$10. The woman appears, therefore, to have been willing to strip herself of all she gets from her father, *i.e.*, \$700 in bank and \$400 in lot, and give \$300 more, to save the mortgage for her little girl and save both of them from public shame.

It is necessary, perhaps, to say a little more of what took place after the 4th May. The plaintiff permitted her to talk it over with her husband that night, and he would return in the morning. I suppose the wife communicated the proposition and her misery in some way to her husband (what passed was not and could not be given in evidence); but, at all events, the effect on the man was simply stupefying. He is, I judge, a slow-witted man: if not exactly stupid, certainly not one to be looked to in an emergency. The plaintiff agrees that any conference between the two would not much help either of them. He is asked: “Of course they did not contribute much to each other’s wisdom? A. I cannot help that . . . I done the best I could.” That is, I think, true. He did the best he could for himself. Walter Cox, when examined, appeared to be all at sea: he says: “My wife got worried over it, and it got me rattled . . . my wife was so much worked up about it and nervous that it got me rattled, and I would not talk to the plaintiff.” “My mind was in a queer state that day” (5th May). “I spoke in the house of getting some advice before she signed and before going to Wyper’s (the executor). . . I did not think of advice at Wilson’s (who drew the agreement); it was

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too far gone: he had us beat. I was beat completely. My idea was when I spoke about getting advice, I wanted to come to Toronto, but he said he had not time—to-morrow was the last day to act. . . . Neither my wife nor I said at our house that we would give what the plaintiff asked." They both contradict, in this, the statement of the plaintiff as to their having given audible assent. "I was not thinking of giving the money in Wilson's office, for I was bothered quite a bit." He also affirms what his wife says, that the plaintiff told them he had authority to break the will, and, if it was broken, we would lose the money, and the girl would lose the \$1,000.

Walter says when the paper was laid before his wife to sign he said, "Hold on, not to sign. I wanted him to leave the paper with me and I would mail it to the lawyers . . . he would not do that: then I said, 'Well, go ahead and sign.'"

I may note in passing that the plaintiff appears to have had complete influence over his sister Mary: she was not privy to this arrangement, and in returning from the draftsman's office the instrument was taken to Mary's house, who was to sign first, and the plaintiff said: "I wonder if she will be satisfied with the agreement: if not she will have to sign." She did sign, but it is said that she has renounced any claim. The other, Catharine, did not appear, nor was she examined as a witness. Of course, whatever claim she may have for nursing will not be affected by the dismissal of this action. She may still proceed against the estate or the recipients of it.

Neither husband nor wife knew anything about law: the talk of a *caveat* would only mystify them, and the plaintiff's protestations of his authority to break the will, and the effect on the will of part of the land having been sold, would only tend further to mislead them. It was eminently a case calling for competent advice, but any attempt to seek this was checked by the peremptory veto of the plaintiff—in effect presenting the filing of the caveat and the purpose of the warning given him as to entering an appearance, to hurry matters to a close while yet the defendant was under the shock of his demand and fear of the consequences which would follow its refusal.

When the plaintiff was asked if he was not an overmatch

for husband and wife, he replies with his usual indirectness, "Not necessarily."

I cannot doubt that the woman was overmatched, overborne, and overreached by her shrewd brother. From the moment of seeing her, he kept her in hand till the paper was signed on the 5th May. He knew that the husband's advice would rather confuse than help her, and he resolutely refused any opportunity for them to get independent assistance. When they did get such assistance, the result was a letter, dated the 14th May, in which the instrument sued upon is repudiated, and the reasons given for its repudiation.

There is another aspect of the plaintiff's evidence that I may briefly advert to. He is asked: "Why do you object to the little girl getting the money? A. She had no claim to it, she had no right to it. Q. How do you mean no claim to it? A. No right to it: no moral right whatever . . . the little girl had no legal right to the money: he left her money that should have been left to us: I made her understand that." We can read into this the method by which the brother made her understand that that little girl had no legal or *moral* claim on the testator or to the money. It is worth while, also, to give his answers to the application for delay and to get advice: "Q. Why did you not let this woman and her husband have three or four days to go and consult their solicitor? A. I could not. Q. Why? A. They had from Wednesday, Wednesday night I went there, and they had from (?to) Thursday morning. Q. Why did you not let them go? A. I was not asked." The defendant gives the reason which the plaintiff gave for refusing them time to get advice. It was this, "that he had just till to-morrow to act." And the husband says the same thing: "The plaintiff said he had not time; to-morrow was his last day to act. I did not know what he meant."

I have gone over the main turning point and the subsidiary ones on which the judgment should turn. Everything else in the way of detail is of little moment. There was the going to the executor Wyper to see if he would draw the paper. He moralised that it was a good thing parties could agree together, and passed them on to a lawyer. Mr. Wilson simply put the

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thing into legal shape according to what Underwood told him, and all this was in the absence of the wife. She had no one but her husband, who was baffled in his attempt, and gave it up. No doubt, she was able to go about the house and attend to domestic routine, getting dinner ready and the like, but that is really no more to the point than to suggest that, because the brother kissed her as he left on the evening of the 4th May, he had the most fraternal regard for her, and that she reciprocated his friendship.

The plaintiff had no belief in his flimsy claims upon his father or upon his estate or in respect to the validity of the will: his whole action indicates a scheme to put money in his pocket (by hook or by crook) at the expense of his sister.

The judgment should be vacated and the action dismissed, with all costs below and in appeal to be paid by the plaintiffs.

LATCHFORD, J.:—I agree in the result.

MIDDLETON, J.:—Upon the facts, there seems to me only one conclusion possible. The bargain itself and all the surrounding circumstances shew that there must have been fraud or over-reaching on the part of the plaintiff. There was mental inequality between the contracting parties, and the stronger was possessed of a weapon which he did not scruple to use in his attack upon the weaker. Therefore, to me at least, it seems plain that the transaction cannot stand.

When it is made to appear that the bargain was not a fair compromise of a real dispute, but a complete surrender to a groundless attack, suspicion is at once aroused; and when the plaintiff is revealed—not only by his letter, but by his evidence—as cruel and unscrupulous, and as a man ready to use an incident in his sister's life for his own financial advantage, and reckless enough to attempt to cause the sister to abandon her defence to this action by the use of the same threat—and cunning enough, with his superficial smattering of legal knowledge, to think that he could conceal this last attempt by the use of the words “without prejudice”—I am compelled to the conclusion arrived at by my Lord the Chancellor, that the contract sued upon is in truth a “nefarious transaction.”



The true function and office of the words "without prejudice" is well defined in *Pirie v. Wyld*, 11 O.R. 422, where it is said that "all communications expressed to be written without prejudice, and fairly made for the purpose of expressing the writer's views on the matter of litigation or dispute, as well as overtures for settlement or compromise, and which are not made with some other object in view and wrong motives, are not admissible in evidence."

This rule, founded on public policy, cannot be used as a cloak to cover and protect a communication such as the letter in question, which contains no offer of compromise, but a dishonourable threat.

*Appeal allowed.*

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*Company—Liability of Directors for Wages of Servants—Action under Ontario Companies Act, sec. 94—Execution against Company—Return by Sheriff—Statutory Requirements—Return Made after Winding-up Order—"Proceeding" against Company—Dominion Winding-up Act, sec. 22—Proof of Status of Defendants as Directors—Travelling Expenses of Servants—Costs of Second Writ of Execution.*

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The plaintiffs, who were servants of a mining company, recovered judgments against the company for wages, and placed writs of execution in the hands of the Sheriffs of two counties, that wherein the company's head office was situated, and that wherein the company's operations were carried on. After this, an order was made for the winding-up of the company under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, and after that order the Sheriffs made returns of the writs *nulla bona*; and thereupon the plaintiffs brought these actions against the directors of the company under sec. 94 of the Ontario Companies Act, 7 Edw. VII. ch. 34:—

*Held*, that to comply with this section it was sufficient that the execution should be placed in the hands of the Sheriff of the county in which the head office of the company was situated; and, upon the facts, the return to the execution so issued was not a mere colourable and illusory return, but a return after due diligence to realise the amount out of the effects of the company.

*Brice v. Munro* (1885), 12 A.R. 453, *Jenkins v. Wilcock* (1862), 11 C.P. 505, and *Moore v. Kirkland* (1856), 5 C.P. 452, followed.

*Grills v. Farah* (1910), 21 O.L.R. 457, distinguished.

2. That sec. 22 of the Winding-up Act, R.S.C. 1906, ch. 144, providing that, "after the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company," did not prevent the making of the return after the winding-up order.
3. That the plaintiffs had given sufficient proof that the defendants were directors of the company.
4. That an allowance for travelling expenses is within the terms of sec. 94.
5. That the plaintiffs were not entitled to recover against the defendants the costs of the second writs of execution.

Judgment of DENTON, Co. C.J., affirmed.

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APPEALS by the defendants and cross-appeals by the plaintiffs from judgments of DENTON, Jun. Co. C.J., in actions in the County Court of the County of York.

The actions were brought against the defendants, as directors of the Boyd-Gordon Mining Company Limited, to recover the amounts of unsatisfied judgments obtained by the plaintiffs against the company for wages, in enforcement of the right given by sec. 94 of the Ontario Companies Act, 1907 (7 Edw. VII. ch. 34).

The judgments appealed from were in favour of the plaintiffs, except as to the costs of a second writ of execution, which were disallowed. The cross-appeals were from this disallowance.

April 2. The appeals and cross-appeals were heard by a Divisional Court, composed of BOYD, C., LATCHFORD and MIDLETON, JJ.

*E. B. Ryckman*, K.C., for the defendants argued that the actions, being brought under the statute, must be confined strictly within its limits, and submitted that, as the effect of the order, under the Winding-up Act, was to stay all proceedings against the company, the plaintiffs must fail, the order having been made before the executions against the company were returned. The return must speak from the date when it was made; and on the 20th October, 1911, when the return was made to the *Pukulski* writ, the goods were in the custody of the law: Churchill's Law of Sheriffs, 2nd ed., p. 347. The return of *nulla bona* to the writ was improper, as there were goods, and the return should have stated the circumstances: *Wright v. Lainson* (1837), 2 M. & W. 739; *Warmoll v. Young* (1826), 5 B. & C. 660; *Grills v. Farah* (1910), 21 O.L.R. 457. If it were possible to make a return at all, it should have been a special one; but, after the winding-up order, the Sheriff was not in a position to take any step whatever, even to make a return, as that would be "proceeding with a proceeding" within the meaning of sec. 22 of the Winding-up Act, R.S.C. 1906, ch. 144. The directors are still officers of the company, and as guarantors in respect of wages are only liable after the company has failed to pay. Nor has it been proved that the defendants are directors.

This is not proved by the Government return of December, 1910; and the minute-book produced is not evidence under sec. 119 of the Companies Act. In any case, that part of the claim which is for travelling expenses and board should be disallowed.

*J. P. MacGregor*, for the plaintiffs, argued that the books kept under sec. 113 of the Companies Act were sufficient *primâ facie* evidence that the defendants were directors of the company, and the onus was on them to shew that they had ceased to be so. As to the return by the Sheriff, he referred to *Brice v. Munro* (1885), 12 A.R. 453, *per* Hagarty, C.J.O., at p. 464. The evidence shews that reasonable efforts were made by the Sheriff to find assets, and that his return was justified by the facts. *Grills v. Farah* is a quite different case from the present, as the action was under different provisions from those here in question. The following cases were also referred to: *Gyfford v. Woodgate* (1809), 11 East 297, cited in *Avril v. Mordant* (1834), 3 L.J.N.S. K.B. 148; *Goubot v. De Crouy* (1833), 1 C. & M. 772. The costs of both executions should have been allowed.

*Ryckman*, in reply.

April 25. *BOYD, C.*:—The liability of the directors of a company to pay one year's wages of the labourers and servants thereof for services performed while they were directors, requires as a preliminary requisite that an execution against the company is to be returned unsatisfied in whole or in part. This is the same form of words which has frequently been the subject of judicial exposition in various company Acts in respect to creditors and shareholders, *e.g.*, the Railway Act, C.S.C. 1859, ch. 66, sec. 80.

The conclusion not now to be controverted is, that it is enough to satisfy the statute if a *bonâ fide* attempt has been made to collect the amount of the judgment from the company, and that a *bonâ fide* return has been made that there is nothing in the shape of assets of the company to satisfy it: *Brice v. Munro*, 12 A.R. 453, at pp. 464 and 468.

It is also sufficient if the writ of execution be directed to the Sheriff of the county where the venue is laid, or the county where the head office of the company is situated, and it be duly returned by him that the company has not any goods or chattels in his bailiwick: *Nixon v. Brownlow* (1856), 1 H. & N. 405;

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*Jenkins v. Wilcock* (1862), 11 C.P. 505. The writ having been issued to the Sheriff, he is bound to return it, and it is not shewn that the return in this case is untrue. On the contrary, it appears that he has done all that the law requires. As expressed by Willes, J., in *Ilfracombe R.W. Co. v. Devon and Somerset R.W. Co.* (1866), L.R. 2 C.P. 15, it must be shewn that "reasonable efforts have been made to discover property of the company which could be made available to satisfy the judgment," and this has been affirmatively established. The proceedings (prior to the date when the winding-up of the company began) upon the execution were neither formal, illusory, nor fraudulent, and were taken for the purposes of, if possible, obtaining satisfaction of the judgment, and not merely to give colour to the statutory action against the directors. The writ was returned unsatisfied because no effects could be found available to the plaintiffs under it. The tests suggested by *Moore v. Kirkland* (1856), 5 C.P. 452, and *Jenkins v. Wilcock*, already cited, have been complied with, and in this essential point the case is very different from *Grills v. Farah*, 21 O.L.R. 457, where a merely formal return of *nulla bona* was directed and procured by the plaintiff himself.

The winding-up order effectually removes any possible assets, whether goods or lands, from the operation of an execution, but it does not otherwise interfere with the right of the plaintiffs to proceed against the directors for the recovery of the claims which could not be levied out of any discoverable goods or chattels up to the time of the return.

The remedy of servants by way of preferential claims under the Winding-up Act is limited to three months' wages (R.S.C. 1906, ch. 144, sec. 70); but they are not obliged to look to or wait for some possible relief to this extent under the Dominion statute: they may well resort to the more favourable provisions of the Ontario enactment: *Mackenzie v. Sligo and Shannon R.W. Co.* (1854), 4 E. & B. 120, and *Palmer v. Justice Assurance Society* (1856), 6 E. & B. 1015.

It is argued that the prohibitions of the Winding-up Act forbid the acts of the Sheriff in making his return of what he had previously done, because of the winding-up order of the



29th September, 1911—his return being dated the 19th October, 1911. The writ issued and was received by the Sheriff on the 12th September; he could discover nothing to be seized up to the 29th September; and this is the information which is communicated by his return. That return is not a proceeding against the insolvent company, within the meaning of the Act.

Sections 22 and 23 are to be read together to ascertain their true scope. Section 22 enacts that, "after the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court and subject to such terms as the Court imposes." Section 23 is: "Every attachment, sequestration, distress or execution put in force against the estate or effects of the company after the making of the winding-up order shall be void."

The former section is evidently to apply to proceedings prior to and with a view to some judgment, and does not relate to "executions," which are named in the next section: and this section relates to things to be enforced against property, such as "executions" and the like, of a final, and "distress" and the like, of a preliminary nature. It relates, however, to these being "put in force" against the property of the company. This Sheriff's "return" of the execution is merely an intimation that it has not been and cannot be "put in force," and that it is and has proved to be abortive. It is not within the mischief to be avoided, and not within the language of the Act.

Apart from these two main contentions, others were urged before us which my brother Middleton has dealt with and disposed of, and I need not go over the same ground, as I agree with his conclusions.

The judgment is right and should be affirmed, with costs in both cases.

MIDDLETON, J.:—These actions were brought by workmen against the defendants as directors of the Boyd-Gordon Mining Company Limited, under sec. 94 of the Ontario Companies Act. This section is as follows: "The directors of the company shall be jointly and severally liable to the labourers, servants,

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and apprentices thereof for all debts not exceeding one year's wages due for services performed for the company while they are such directors respectively; but no director shall be liable to an action therefor, unless the company has been sued therefor within one year after the debt became due, nor unless such director is sued therefor within one year from the time when he ceased to be such director, nor before an execution against the company has been returned unsatisfied in whole or in part; and the amount due on such execution shall be the amount recoverable with costs against the directors."

Apart from some minor matters, the main contention of the defendants is based upon the fact that, before the executions against the company were returned, a winding-up order under the Dominion Act had been pronounced. It is said that the effect of this order was to stay all proceedings against the company, and that, therefore, the returns to the executions made after the winding-up are null and void.

The question so raised is of importance, as, if the defendants' argument is well founded, the effect of the winding-up order is materially to diminish the right of wage-earners and the liability of directors; because, under the Ontario statute, the directors are liable to the extent of one year's wages, while, under the Dominion Winding-up Act, the wage-earner is entitled only to a preference for his unpaid wages not exceeding the arrears which have accrued during the three months next previous to the date of the winding-up order: R.S.C. 1906, ch. 144, sec. 70. The question is also of importance because, in many cases, the entire assets of the company in liquidation are taken by debenture-holders; and, if the contention is well founded, the directors, by reason of the winding-up order, may altogether escape this statutory liability.

Before considering the validity of this argument and the other questions raised, it is desirable to set out the facts proved at the trial, at length.

The Boyd-Gordon Mining Company has its head office at Toronto. It conducted mining operations in the district of Nipissing. On the 11th September, 1911, Pukulski recovered judgment against the company for \$157.06, wages earned during

the months of June, July, and August, 1911, and \$22.04 taxed costs, in addition to the costs of execution. Upon the same day writs of execution against goods and lands were issued to the Sheriff of Toronto, and on the following day these were placed in the hands of the Sheriff for execution. Contemporaneously, an execution was issued directed to the Sheriff of Nipissing. This was placed in the hands of that Sheriff on the 15th September.

On the 16th September, the company made an assignment for the benefit of its creditors; and on the 29th September an order was made for the winding-up of the company under the Dominion Act.

In order that the conditions precedent prescribed by the statute might be complied with, the plaintiffs' solicitor requested the Sheriffs to return these writs of execution, and they were respectively returned unsatisfied. The endorsement upon the writ to the Sheriff of Toronto was: "*Nulla bona*. The answer of Fred. Mowat, Sheriff." The return upon the Nipissing writ was: "Returned unsatisfied. H. Varin, Sheriff." Thereupon this action was brought.

The contention of the defendants is, that the returns made to the writs are void, because, by sec. 22 of the Winding-up Act, it is provided that, "after the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court and subject to such terms as the Court imposes;" and by sec. 23 it is provided that "every attachment, sequestration, distress or execution put in force against the estate or effects of the company after the making of the winding-up order shall be void."

The cases collected by Mr. Justice Riddell in *Grills v. Farah*, 21 O.L.R. 457, are relied upon as shewing that it is open to the defendants to attack the return in a proceeding such as this. That action, and the cases there cited, were not proceedings under the same provision of the Ontario Companies Act, but were under the provision which enables a creditor of the company to reach the unpaid capital by proceeding against the individual shareholders—analogueous to *sci. fa*. Before these proceedings can be taken, it must be shewn that an execution against

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the company has been returned unsatisfied. *Moore v. Kirkland*, 5 C.P. 452, and *Jenkins v. Wilcock*, 11 C.P. 505, both determine that what the statute requires is not a return *pro formâ*, but a return after due diligence to realise the amount out of the effects of the company. As it is put by Draper, C.J., in the latter case: "It is not, to be sure, a mere illusory formal proceeding, to give colour to proceedings against a shareholder."

*Brice v. Munro*, 12 A.R. 453, establishes that all that is required is, that the execution should be issued to the Sheriff of the county in which the head office of the company is.

Upon the facts in this case, it is quite clear that the return to the execution was not a mere colourable and illusory return, and that the Sheriff had exercised due diligence to find assets within his shrievalty. Upon the hearing it was not shewn that there were any assets which could have been taken under execution. At present it seems to me that the onus was upon the defendants, but the plaintiffs have assumed that it was for them to do more than put in the return; and, if they rightly assumed the onus, they have abundantly discharged it.

Then, does the Dominion Act quoted prevent the making of the return after the winding-up? I think clearly not. That statute aims at the ratable distribution of the assets of the company among its creditors; and so the winding-up supersedes the executions and prevents the creditor from further prosecuting his execution against the assets of the company. The Sheriff would then be justified in returning the execution unsatisfied. He is not by the Ontario Act required to make a return *nulla bona*; and I think it would be sufficient if he made a special return, stating: "I return the writ unsatisfied, because I am unable to take the assets of the company within my bailiwick in execution, by reason of the making of an order under the Dominion Winding-up Act for the winding-up of the company." This cannot be regarded as a "proceeding with the writ against the company," which is the thing prohibited by the statute. The Ontario statute, which imposes this liability upon the directors of the company, seeks to protect them from vexatious proceedings while the company has assets to which the creditor may resort. As soon as these assets are withdrawn from and ren-



dered unavailable to the process of the wage-earner, and the Sheriff certifies that there are no assets which he can take, the obstacle is removed and the wage-earner is free to enforce his remedy.

It is argued that the plaintiff has not proved that the defendants are directors of the company. He has put in a certified copy of the last Government return, which shews that the defendants were then directors; and he has produced the minute-book of the company from the custody of the liquidator, these minutes shewing that the directorate has not since been changed. This appears to be sufficient.

Two minor questions were argued before us. It was said that an allowance for travelling expenses did not come within the statute. We thought it did.

Then the plaintiff complained that he had not been allowed the costs of the second writ of execution, and cross-appealed with reference to it. We think the Judge was right in disallowing these. See *Marquis of Salisbury v. Ray* (1860), 8 C.B. N.S. 193; and *In re Long, Ex p. Cuddeford* (1888), 20 Q.B.D. 316.

Both appeals should be dismissed. The defendants should pay the costs, less \$5 allowed in respect of the cross-appeal.

The facts in the *Perryman* case are substantially similar, and the same order will be made in it.

LATCHFORD, J.:—I agree.

*Appeals dismissed.*

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## KUULA V. MOOSE MOUNTAIN LIMITED.

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*Practice—Consolidation and Stay of Actions—Common Defendant—Distinct Claims of Different Plaintiffs—Damages—Directions as to Trial.*

Four different plaintiffs brought separate actions against the same defendants; the cause of action in each case was injury to the premises of the plaintiff by the spread of fire negligently set out by the defendants upon their land and negligently permitted to spread to the plaintiff's land:—*Held*, affirming the order of the Master in Chambers, that there could not be consolidation of the actions, upon the application of the defendants, either in the strict sense of the word "consolidation," as used in Con. Rule 435, or in the looser sense, as where one of the actions is selected as a test action, and the trial of the others stayed until it has been finally determined. The issues in the four cases, though similar, were quite distinct. And a plaintiff cannot be compelled to tie up his case with those of the other plaintiffs, without his consent.

*Lee v. Arthur* (1908), 100 L.T.R. 61, *Westbrook v. Australian Royal Mail Steam Navigation Co.* (1853), 23 L.J.N.S. C.P. 42, and *Williams v. Township of Raleigh* (1890), 14 P.R. 50, applied and followed.

Although a consolidating order was refused, a direction was given that the four actions should be entered for trial at the same sittings, in order that the trial Judge might make such arrangements as would prevent unnecessary repetition of evidence.

Consideration of the practice in regard to the consolidation and stay of actions.

MOTION by the common defendants in the above action and three others, each brought by a different plaintiff, for an order consolidating the four actions or staying three of them until after the trial and final disposition of one, the defendants undertaking to be bound by the result in that one.

April 16. The motion was heard by Mr. James S. CARTWRIGHT, K.C., Master in Chambers.

*R. C. H. Cassels*, for the defendants.

*H. E. Rose*, K.C., for the several plaintiffs.

April 17. THE MASTER:—These four actions are brought to recover damages alleged to have been suffered by the respective plaintiffs through a fire set out by the defendants on their own lands in the township of Hutton, on the 10th July, 1911.

The first plaintiff claims \$2,809.02; the second, \$95,000; the third, \$32,500; and the fourth, \$31,207.58. No details are given of these sums. In each case the statement of claim alleges negligence on the part of the defendants. The plaintiffs are all

represented by the same solicitors. The statement of defence in each case is a simple denial of the allegations of the statement of claim.

The defendants now move to have these actions consolidated, or to stay three of them until the first action has been tried, the defendants undertaking to be bound by the result in that case.

The defendants also ask that only one of four examinations of their officers for discovery be allowed to proceed. In each case, an appointment has been taken out for this purpose, and in each case for the examination of a different officer.

Unless the decision in one of a number of actions, such as those in question, would *necessarily* dispose of the essential cause of action in the others, no order could be usefully made to stay the rest. And unless this could be done, the actions could evidently not be consolidated.

The present cases seem to be analogous to that of *Williams v. Township of Raleigh* (1890), 14 P.R. 50. There, at p. 53, it was said: "Proof that there was the resulting injury to the lands of one plaintiff would not be proof of any evidence at all that there was the like" (or any other) "injury to the lands of any other plaintiff." These words are applicable to the present motion; and, though the decision was given before Con. Rule 185 was amended to read as it now stands, yet it is not less an authority.

It is at least doubtful if these four plaintiffs could have united in one action. The only thing alleged in common is the fact that a fire or fires were negligently set out by the defendants. This, though technically in issue, is probably not denied, so far as the fact of fire being set out is concerned. But what would be sufficient proof of negligence by one plaintiff might not be so in the case of the others—much would depend upon location, direction of wind, condition of the plaintiff's own property, and other circumstances peculiar to each case.

The only direction that can usefully be given now is, that the actions be all set down together so that any evidence common to all (if such there be) may not be repeated, as the trial

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Judge would, no doubt, direct. See *Carter v. Foley-O'Brien Co.* (1912), 3 O.W.N. 888, citing the *Raleigh* case.

As to the examinations for discovery, that point too was dealt with in *Carter v. Foley-O'Brien Co.*, though there it was the converse case of a plaintiff wishing to have only one examination for discovery, to be applicable to all the three actions. There it was said by Middleton, J.: "Even if convenience indicated the propriety of the order sought, I am clear that there is no power to make it."

Neither of the reliefs asked for here could possibly have been granted if the plaintiffs had not all been represented by the same solicitors. See as to this, *Conway v. Guelph and Goderich R.W. Co.* (1907), 9 O.W.R. 369, affirmed on appeal, *ib.* 420—where the matter is considered generally, and the difficulties that might arise if consolidation was ordered, are pointed out.

For the same reasons, it does not seem possible to interfere with the examinations for discovery. As the plaintiffs' solicitors are the same, it is not to be presumed that, if one examination gives the necessary information, they will proceed with the others—especially as these depositions cannot be used at the trial. But, even if they do, that must be left to the trial Judge or the Taxing Officer to deal with, when the question of the costs is raised before them or either of them. The only way that occurs to me of avoiding more than one examination is for the defendants to make admission of such fact or facts as are common to all the cases.

In this way possibly the length of more than one examination might be considerably reduced, even if proceeded with. But, apart from their own consent, there is no power to control or limit the plaintiffs' proceedings so long as they are regular.

The motion will be dismissed—costs in the cause to the plaintiffs.

The defendants appealed from the order of the Master.

April 30. The appeal was heard by MIDDLETON, J., in Chambers.

*R. C. H. Cassels*, for the defendants.

*H. E. Rose*, K.C., for the plaintiffs.



May 3. MIDDLETON, J.:—It is said that on or about the 10th July, 1911, the defendants set out a fire upon their lands, which fire spread, and destroyed the premises of the several plaintiffs in these four actions. In each action the plaintiff presents his case in alternative ways. First, he charges that the fire set out on the defendants' premises spread to his; next, he charges that the fire was set out negligently; and, in the third place, that by reason of the negligence the fire was permitted to spread on the defendants' premises to the plaintiff's premises.

The Master, while refusing consolidation of the actions, has directed that they shall all be entered for trial at the same sittings of the Court, and at the trial the presiding Judge will, no doubt, make such arrangements as will prevent unnecessary repetition of evidence, in all the cases. But it is manifest that, if each plaintiff has to establish that the fire escaped from the defendants' premises to his premises by reason of the negligence of the defendants, the issue in each case, although similar, is quite distinct.

There is much confusion upon the subject of consolidation of actions, arising mainly from a loose and inaccurate use of the word "consolidation." As said by Moulton, L.J., in *Lee v. Arthur* (1908), 100 L.T.R. 61, 62: "Consolidation is much more rarely applicable than is generally supposed, because the expression is used in cases where the word is really not appropriate at all, as in cases where the trial of one action is stayed pending the hearing of another action. In a case like that the Court will not allow its process to be abused. That is often called 'consolidation,' but it is not really consolidation."

It is important, in the first place, to observe that Con. Rule 435 is intended to deal with the consolidation of actions, in the strict sense of that term. The jurisdiction to stay actions probably exists quite apart from any statutory provision, as part of the inherent power of the Court over its own process; but this power is recognised and confirmed by sec. 57, sub-sec. 9, of the Judicature Act.

Con. Rule 435 provides that "actions may be consolidated by order of the Court or a Judge in the manner in use in the

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Superior Courts of Common Law, prior to the Ontario Judicature Act, 1881." The terms of this Rule have given rise to some difference of opinion. It was at one time supposed that it permitted consolidation only in the cases in which at common law consolidation would have been ordered prior to the Judicature Act. But this has been set at rest by the decision in the Court of Appeal in *Martin v. Martin & Co.*, [1897] 1 Q.B. 429, where this construction of the Rule was rejected, and it is said that the true meaning of the expression "in the manner in use," etc., is not to continue the practice in force before the Act, but "that if an order is made it should be treated in the same manner as before."

At common law, consolidation originally applied to the case where there were two actions between the same parties. There the actions were "consolidated," in the strict sense of the term; the issues raised in the two actions were directed to be set up in one action. If the plaintiff unnecessarily instituted two or more actions, based upon separate claims, which could conveniently be tried together, his conduct was regarded as vexatious. If good reason existed for the separate actions—*e.g.*, if one claim was not due when the other action was brought—the Court, in the control of its own process, consolidated so as to avoid unnecessary litigation.

By statute 19 Viet. ch. 43, sec. 76—afterwards sec. 75 of the Common Law Procedure Act, C.S.U.C. 1859, ch. 22—a husband and wife, suing in respect of an injury to the wife, might join in the same suit a claim by the husband in his own right; and, if separate actions were brought, these might be consolidated. This is also true consolidation.

At common law also, a practice had grown up, not upon any statutory power, but entirely upon the inherent jurisdiction of the Court, of staying the trial of actions pending the determination of a test action. This frequently is somewhat loosely described as "consolidation." The practice was introduced by Chief Justice Mansfield in actions brought against underwriters in insurance cases. The promises of the underwriters being separate, separate actions had to be brought, in respect of any loss, against each of the underwriters. Frequently there was

only one question really to be tried, such as the fact of loss. Upon the application of the defendants in such a case, the actions would be stayed, if the defendants undertook to consent to judgment in the event of the plaintiff succeeding in the test action. In the event of the plaintiff's failure, he would then either abandon the other actions or proceed with them, as he saw fit. As this relief was an indulgence to the defendants, they were compelled to consent to this somewhat one-sided bargain. See, for example, *Colledge v. Pike* (1886), 56 L.T.R. 124.

Conversely, where a plaintiff, having brought several actions for similar causes of action, applied for a stay of proceedings to relieve him from the onus of prosecuting a number of actions in which he might be unsuccessful, a stay was ordered, upon the terms that, if he failed in the action which he chose as a test action, he should consent to a judgment against him in all the others.

In the Courts of equity, consolidation, in either the strict sense or the modified sense, seems to have been unknown. The Court undoubtedly exercised its power to restrain abuse of its process, and it would not permit the prosecution of two suits for the same cause of action; but the reported instances differ widely from the cases at common law. If two actions were brought on behalf of an infant by different next friends, the Court stayed the proceedings in one. If two suits were brought for administration, as soon as judgment was pronounced in one, the proceedings in the other were stayed; because the administration judgment was a judgment in favour of all. Where several suits were brought by different debenture-holders, for the purpose of realising their securities, one action alone was allowed to proceed. The principle in all these cases was, that two suits for the same relief ought not to be allowed to proceed in the same Court concurrently. See cases collected in Daniell's Chancery Practice, 5th ed., p. 698.

After the Judicature Act, in *Amos v. Chadwick* (1877), 4 Ch.D. 869, Malins, V.-C., construed the Consolidated Rule in the manner now rejected by the Court of Appeal; but, by virtue of the inherent power to prevent abuse of the process of the Court, he stayed until after the trial of the test action seventy-eight

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actions brought by different shareholders against the directors of a company for misrepresentation in the prospectus. The plaintiff selected failed to prosecute his action, and, as he did not appear at the trial, the action was dismissed. The terms of the order for consolidation appear from the report of the case in (1878), 9 Ch.D. 459. It provided that the plaintiffs, who had applied for consolidation, should be bound by the test action; but the defendants were to be at liberty to require a separate trial. After this abortive proceeding, a motion was made for relief and for the trial of another action as a test action. Malins, V.-C., then made an order substituting another action as a test action. The defendants appealed; and the sole question upon the appeal was, whether the test action had been "tried," within the meaning of the terms of the order. The Court upheld the defendants' contention. But it is manifest that some, at any rate, of the Judges doubted whether the original order had been properly made; Brett, L.J., saying (9 Ch.D. at p. 464): "It seems to me that no such order as this ought to be made unless the questions in the actions are substantially the same, and the evidence would be substantially the same if they were all tried."

This view is that now adopted in the case already cited, *Lee v. Arthur*, where the Master of the Rolls quotes the judgment in the case of *Corporation of Saltash v. Jackman* (1844), 1 D. & L. 851, and states that the Court "cannot compel one defendant against his wish to have his case tied up with those of defendants in other actions."

The same reasoning shews the impossibility of compelling a plaintiff to tie up his case with those of other plaintiffs, without his consent. *Westbrook v. Australian Royal Mail Steam Navigation Co.* (1853), 23 L.J.N.S. C.P. 42, is an illustration of this. Eight separate passengers, by the same attorney, brought separate actions for damages arising out of a breach of contract for passage, whereby the plaintiffs suffered in their health. Maule, J., said: "They have different grievances. Mr. Smith could not be said to have suffered in Mr. Brown's health."

*Williams v. Township of Raleigh*, 14 P.R. 50, affords another illustration. Several plaintiffs brought separate actions for



injury to their several farms by certain drainage works; and it was held by Ferguson, J.—a Judge most familiar with the common law practice—that there could not be consolidation, in either the true or the modified sense of that expression.

The direction which has been given by the learned Master in Chambers, I think, satisfactorily meets the case. Manifestly, damages will have to be assessed in the different cases; and it would be most unfair to direct the trial of the individual claims to be delayed, when this would delay the recovery of final judgment. The circumstances prevent the imposition of the term invariably required: a stay will only be granted when the defendants consent to judgment—that is, a final judgment—in the event of their failing in the test action.

The appeal will be dismissed. Costs to the plaintiffs in any event.

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[IN THE COURT OF APPEAL.]

RE WEST LORNE SCRUTINY.

*Municipal Corporations—Local Option By-law—Voting on—Scrutiny—Scope of—Municipal Act, 1903, secs. 369-372—Votes of Tenants—Residence—Finality of Voters' Lists—Voters' Lists Act, 7 Edw. VII. ch. 4, sec. 24 (2)—Vote of Person Disentitled by Non-residence—Inquiry as to how Ballot Marked—Municipal Act, 1903, sec. 200—Deduction of Disallowed Votes from Majority in Favour of By-law.*

A scrutiny under secs. 369-372 of the Consolidated Municipal Act, 1903, in regard to the voting upon a local option by-law, is something more comprehensive than a simple recount; and, when proceeding with a scrutiny under that section, a County Court Judge has authority to inquire whether any persons who have cast their ballots come within the excepted class mentioned in sub-sec. 2 of sec. 24 of the Ontario Voters' Lists Act; MACLAREN and MEREDITH, J.J.A., dissenting.

Upon such a scrutiny, it is competent for the County Court Judge to declare void the vote of a person voting as a tenant who has cast a ballot, when it appears that, although his name was on the certified list, he was not, when it was placed thereon, resident and has not since become resident within the municipality to which the list relates—within the very terms of sub-sec. 2, above referred to, he is not and has not been resident within the municipality to which the list relates; MACLAREN and MEREDITH, J.J.A., dissenting.

Upon such a scrutiny, the County Court Judge has no power to inquire how any person who was not entitled to vote, marked his ballot: Municipal Act, 1903, sec. 200.

And the County Court Judge should deduct the disallowed votes from the affirmative votes.

Review of the previous decisions upon these questions.

*In re Local Option By-law of the Township of Saltfleet* (1908), 16 O.L.R. 293, and *Re Orangeville Local Option By-law* (1910), 20 O.L.R. 476, specially considered.

Judgment of a Divisional Court, 25 O.L.R. 267, reversed.

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APPEAL by D. H. Mehring, the applicant for a scrutiny, from the order of a Divisional Court, 25 O.L.R. 267, 277, varying the order of MIDDLETON, J., 23 O.L.R. 598.

January 24. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*C. St. Clair Leitch* and *J. M. Ferguson*, for the appellant, argued that the case turned on the interpretation of sec. 24 (2) of the Voters' Lists Act, and on the decision in *In re Local Option By-law of the Township of Saltfleet* (1908), 16 O.L.R. 293, and that, on the evidence material and the law applicable to the case, an order should not be made prohibiting the County Court Judge from certifying that the by-law in question had not been approved by the requisite three-fifths majority.

*W. E. Raney*, K.C., and *J. Hales*, for Dugald McPherson, respondent, argued that the decision of the Divisional Court on the first branch of the case, the question as to the jurisdiction of the County Court Judge to go behind the voters' list, was right and should be affirmed. The following cases were referred to: *Re Weston Local Option By-law* (1907), 9 O.W.R. 250; the *Saltfleet* case, *supra*; *Re Orangeville Local Option By-law* (1910), 20 O.L.R. 476; *Re Ellis and Town of Renfrew* (1911), 23 O.L.R. 427; *In re McGrath and Town of Durham* (1908), 17 O.L.R. 514. As to the second branch of the case, the right of the County Court Judge to inquire how the persons whose votes were disallowed, did vote, it was submitted that the judgment of MIDDLETON, J., was right, and that the Courts had gone too far in their requirements as to absolute secrecy.

*Leitch*, in reply, referred to *Re Sinclair and Town of Owen Sound* (1906), 13 O.L.R. 447; *Haldimand Dominion Election Case* (1888), 1 Ont. Elec. Cas. 529; *Re Lincoln Election Petition* (1878), 4 A.R. 206; *Rex ex rel. Ivison v. Irwin* (1902), 4 O.L.R. 192.

April 29. Moss, C.J.O.:—Appeal from a judgment of a Divisional Court, reported 25 O.L.R. 267, allowing an appeal from a judgment of Middleton, J., reported 23 O.L.R. 598. The facts are fully stated in the report.

This case furnishes another example of the difficulty and confusion which so often arise from the adoption by the Legislature of the device of incorporating by reference some of the provisions of one statute into the body of another statute which is being enacted. The disadvantages of this mode of legislation have been remarked upon in England and this country, and it has been truly said that this procedure makes the interpretation of modern Acts of Parliament a very difficult and sometimes doubtful matter. See *Knill v. Towse* (1889), 24 Q.B.D. 186, 196, where the question was not unlike in some respects the question involved in this case. And a legislative committee in England is reported to have described legislation by reference as making an Act so ambiguous, so obscure, and so difficult that the Judges themselves can hardly assign a meaning to it, and the ordinary citizen cannot understand it without legal advice: Craies' edition of *Hardcastle on Statutory Law* (1907), p. 26.

It is scarcely to be wondered at, therefore, that unanimity of opinion is not to be found expressed in many of the decisions in which the questions arising on this appeal or some of them have been discussed.

The first question raised in the appeal has been much debated and has given rise to much divergence of opinion among the Judges who have had it under consideration in other cases. As stated by Teetzel, J., in his opinion delivered while sitting as a member of the Divisional Court whose judgment is now in appeal, the question is: whether, upon a scrutiny under the Municipal Act, the County Court Judge may declare void and deduct from the result the vote of a tenant whose name was upon the certified voters' list, but who was not in fact a resident of the municipality when the list was certified, and who never afterwards became a resident therein.

This question affects 4 votes polled; and, if answered in the negative, as it was by the Divisional Court, practically ends any necessity for discussion as to the fate of the one other vote polled, which is in question here.

In holding that the 4 votes in question were not open to attack upon the scrutiny, the Divisional Court considered itself bound so to hold by the decision of another Divisional Court in

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*In re Local Option By-law of the Township of Saltfleet*, 16 O.L.R. 293, though it had been subjected to adverse comment in some other cases.

In *Re Orangeville Local Option By-law*, 20 O.L.R. 476, Meredith, C.J., considered the question of the jurisdiction of the Judge to enter upon an inquiry as to the right to vote of any one who has deposited his ballot paper, and declared his own opinion to be against the exercise of such jurisdiction. He expressed the opinion that the inquiry is limited to a scrutiny of the ballot papers, and differs only from a recount in that the Judge is not limited to dealing with the ballot papers *ex facie*, but may take evidence in the same way as may be done upon a trial of the validity of an election of a member of a municipal council for the purpose of determining whether any ballot paper ought or ought not to be counted.

With deference, I am unable to follow the distinction drawn between a scrutiny of ballot papers and a scrutiny of votes, bearing in mind the object with which the scrutiny is entered upon. The Judge is to determine and certify whether the majority of votes given is for or against the by-law. He is not merely, as in the case of a recount under sec. 189 of the Consolidated Municipal Act, 1903, to count up the votes given upon the ballot papers not rejected, and make up a written statement of the number of votes given for each candidate and of the number of ballot papers rejected and not counted by him, and certify the result to the returning officer. In all this he is acting in a ministerial capacity. In a scrutiny he is acting in a judicial inquiry, with the purpose of ascertaining which way, in truth and in fact, the majority of the votes is given. Light is thrown upon this view by the language of sec. 24 of the Ontario Voters' Lists Act, 7 Edw. VII. ch. 4, which expressly refers to a scrutiny under the Municipal Act, as well as to one under the Ontario Election Act. That section declares that "the certified list shall, upon a scrutiny, under" either of these Acts, "be final and conclusive . . . except." The exception applies to one scrutiny as much as the other. Then what is the extent of the exception under sub-sec. 2, which is the one with which we are immediately concerned? It applies to persons who, subse-



quently to the list being certified, are not or have not been resident either within the municipality to which the list relates, or within the electoral district for which the election is held, and who by reason thereof are, under the provisions of the Ontario Election Act, disentitled to vote.

If this sub-section applies to municipal elections, it also applies to voting on by-laws, by the express terms of the preceding part, which speaks of a scrutiny under the Municipal Act.

So that, when conducting a scrutiny under the Municipal Act, reference must be made to the provisions of sec. 24 of the Ontario Voters' Lists Act in order to ascertain the extent to which the inquiry can proceed. I agree with those who think that a scrutiny under sec. 371 of the Consolidated Municipal Act, 1903, is something more comprehensive than a simple recount; and that, when proceeding with a scrutiny under that section, the County Court Judge has authority to inquire into the question whether any persons who have cast their ballots come within the excepted class mentioned in sub-sec. 2 of sec. 24 of the Ontario Voters' Lists Act.

I am also of opinion that it is competent for the County Court Judge to declare void the vote of a person who has cast a ballot, when it appears that, although his name was on the certified list, he was not, when it was placed thereon, resident and has not since become resident within the municipality to which the list relates. Within the very terms of the sub-section, as it appears to me, he is not and has not been resident within the municipality subsequently to the list being certified. I am unable to see why any distinction should be drawn between his case and that of a person who was resident within the municipality when the list was certified, but ceased to be resident subsequently to the list being certified.

The one remaining vote held void by the County Court Judge was admittedly within the exception of sub-sec. 2. The result should, in my opinion, be that the County Court Judge's ruling was correct, and that his certificate should stand.

The remaining question dealt with by the Divisional Court is, whether, if the County Court Judge, upon a scrutiny con-

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ducted by him, finds that a person whose name was upon the list, but who had no right to vote, did vote, such person may be compelled to disclose before the County Court Judge how he did vote. While the decision of the Divisional Court on the other branches of the case rendered it unnecessary to consider this question so far as the result was concerned, it deemed it of sufficient importance to justify a determination upon it.

Without entering upon any extended discussion, I think it quite sufficient for me to say that I entirely agree with the conclusion of the Divisional Court upon the question, as expressed in the opinion of Teetzel, J.

The result upon the whole is, that the order of the Divisional Court should be set aside, and that the County Court Judge should be left at liberty to certify the result of the scrutiny to the council.

But, in view of the varying and conflicting opinions and the apparent difficulty in solving the questions at issue, there should be no costs of any of the proceedings.

GARROW, J.A.:—This is an appeal from the judgment of a Divisional Court reversing an order of Middleton, J., made in the matter of a vote taken in the village of West Lorne upon a local option by-law.

After the vote had been taken, one Dameon H. Mehrling applied to the Judge of the County Court of the County of Elgin for a scrutiny of the ballot papers. The scrutiny was granted, and was proceeding when one Dugald McPherson applied to Middleton, J., for an order prohibiting the County Court Judge from entering upon an inquiry as to the right to vote of 5 persons whose names appeared upon the voters' list and who had voted, but who, it was alleged, were disqualified, or, in the alternative, for a mandatory direction to the County Court Judge to ascertain how these persons had voted.

Middleton, J., agreeing with the County Court Judge, held that these persons were not entitled to vote, and directed him to inquire and ascertain how they had voted in order to determine whether the majority of the lawful votes given was for or against the by-law.

An appeal from this order was taken and was heard first before the King's Bench Division (see 25 O.L.R. 267); and, in consequence of the difference of opinion there expressed, re-argued before the Exchequer Division (see 25 O.L.R. 277), when the appeal was allowed.

The judgment of Middleton, J., is reported in 23 O.L.R. 598.

The polling took place on the 2nd January, 1911. The voters' list was finally revised and certified on the 28th October, 1910. The 5 persons whose votes are in question were all upon the list as tenants. Four of them had ceased to reside in the municipality before the voters' list was certified. One of them became non-resident afterwards, namely, on the 5th December, 1910. The total number of votes polled, including those of the before-mentioned 5 persons, was 234. The votes for the by-law were 142, and against 92. The learned County Court Judge proposed to deduct these 5 votes from the total, leaving as the actual total 229. And he also proposed to deduct the whole of the 5 votes from the votes cast in favour of the by-law, which would have left 137, or less than the required three-fifths of the proper total, and would have so certified but for the prohibition granted by Middleton, J.

The Divisional Court was of the opinion, following the *Saltfleet* case, 16 O.L.R. 293, that the County Court Judge had no legal authority to disallow the 4 votes given by the tenants who had ceased to reside in the municipality before the voters' list was certified, and that in that case it was unnecessary to deal with the fifth, who had ceased to so reside thereafter, because the disallowance of that vote would not affect the result. The Court further held that the inquiry directed by Middleton, J., into how a person had voted, would be contrary to the provisions of sec. 200 of the Consolidated Municipal Act, 1903.

The questions involved are, therefore, three, namely: (1) were the 5 tenants, or any of them, disqualified because they had ceased to reside in the municipality before the voting; (2) had the County Court Judge power, on a scrutiny held under sec. 369 of the Consolidated Municipal Act, 1903, to disallow such votes, or any of them; and (3), if they were properly dis-

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allowed, what should follow—should they be deducted, as the County Court Judge proposes to do, from the affirmative vote, without inquiry, or should there be an inquiry, as Middleton, J., seemed to think, and the deduction made as the result of such inquiry?

By sec. 141 (1) of the Liquor License Act, a local option by-law must, before being finally passed, be approved by the “electors of the municipality”. And who are such “electors” is determined by sec. 86 of the Consolidated Municipal Act, 1903. We are concerned here only with tenants, and their right to vote, or in other words, to be “electors” of the municipality. These are provided for by clause “secondly” of sec. 86, which says: “All *residents* of the municipality who have resided therein for one month *next before* the election, and who are, or whose wives are, at *the date of the election*, tenants in the municipality.” They must, of course, in addition, be upon the voters’ list used at the election.

Residence alone is not sufficient, nor is being upon the voters’ list, without residence, sufficient. Both must exist to qualify the tenant voter. And, that being so, it is perfectly clear that none of the 5 was qualified or entitled to vote on the by-law in question. The Ontario Voters’ Lists Act, 7 Edw. VII. ch. 4, sec. 24, was relied on as the foundation for a contrary view. The one statute, however, is of as much force and virtue as the other, unless the later one was intended to repeal the earlier, of which there is not the very slightest indication. And both must, therefore, be read together, as, in my opinion, they can be with perfect harmony, as expressing the law upon the subject. No one disputes the finality of the voters’ list as expressed in sec. 24 of the Voters’ Lists Act. However disentitled to be upon the list, if a person is upon it, and conforms to sec. 86 of the Municipal Act as to residence, such a person’s vote cannot, I think, be questioned. It was said in the *Orangeville* case, 20 O.L.R. 476, at p. 479, by Meredith, C.J., that the only paragraph of sec. 24 of the Voters’ Lists Act which is applicable to a municipal election, or a vote on a by-law, is the first, and that paragraph 2 is applicable only to elections under the Ontario Election Act. I am, with deference, unable to agree with the



latter statement. There is nothing in the Election Act requiring a voter to reside in any particular municipality after the voters' list is made up and certified, but he must continue to reside in the electoral district to entitle him to vote at an election to the Assembly. The words "within the municipality," followed by "or within the electoral district," would, therefore, make the former words meaningless and unnecessary, unless they are held to apply, as, in my opinion, they do, to municipal elections and to the disqualification by reason of non-residence for which the Municipal Act provides.

Clause 2 of sec. 24 should, perhaps, have contained a reference to the Municipal Act, as well as to the Ontario Election Act. As it is, its proper construction is, I think, to regard the later words, "and who by reason thereof are, under the provisions of the Ontario Election Act, disentitled to vote," as referring only to the words, "or within the electoral district for which the election is held," which immediately precede them. It is unreasonable to suppose that the Legislature, while carefully preserving the provisions as to residence contained in the Election Act, intended, in such an indirect manner, to repeal the very similar provisions as to residence contained in the Municipal Act, affecting as they do every class of voter except a freeholder.

The question, however, in the view I take, is not vital, for the real disqualification arises, in my opinion, not under the Voters' Lists Act so much as under the plain language of sec. 86 of the Municipal Act, which, while fully accepting the finality of the voters' list, cannot be ignored as to events subsequently occurring or existing.

The next question is as to the power and authority of a County Court Judge, upon a scrutiny, to deduct such votes—a question which has been frequently discussed and upon which divergent views have been from time to time expressed.

The decision of the Divisional Court in the *Saltfleet* case, 16 O.L.R. 293, seems to mark an epoch. Teetzel, J., before whom the matter first came, was of the opinion that the County Court Judge had no power to question the right of any voter to vote, or to disallow any vote, and that his power was confined

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to compelling the production before him of the voters' lists and all material used at the election, and hearing evidence, as he might consider necessary, with reference to the ballots, so that he might ascertain exactly the number of ballots cast for and against respectively, and that he might determine, upon something more than the mere ballot itself, if necessary, as to its validity or invalidity as a ballot. The appeal to the Divisional Court was, upon the facts, dismissed with costs. But, in the judgments of the learned Chancellor and Magee, J., a larger view was taken of the County Court Judge's powers, which view has since, though frequently anathematised—see *per* Anglin, J., in *In re McGrath and Town of Durahm* (1908), 17 O.L.R. 514; *per* Meredith, C.J., in the *Orangeville* case, 20 O.L.R. 476; and *per* Riddell, J., in *Re Ellis and Town of Renfrew*, 21 O.L.R. 74—been followed.

The view of the learned Chancellor is set out on p. 302 of 16 O.L.R. As will be seen, he regarded the scrutiny in such a case as something more than a simple recount, the extent of it to be measured "by what can be done on inspection of the ballot papers, and the ascertainment of what votes are void *ex facie*, and the scope of investigation contemplated by the exceptions to the finality of the voters' list." Earlier on the same page, he had said that a subsequent change of residence, which would disqualify, might be investigated under sub-clause 2 of sec. 24 of the Voters' Lists Act, but not a subsequent change of status.

With a subsequent change of status we have nothing to do here. We are dealing only with the case of non-resident tenants whose names are upon the voters' list; and, with deference, it seems to me to be a matter of perfect indifference when such non-residence began, whether before or after the voters' list was certified, if in fact it continued to exist down to within one month of the election or vote, as the case may be. The inquiry in both cases is wholly as to a state of facts existing subsequent to the perfection of the voters' list, and is in no respect in derogation of its finality, the point at which the inquiry in both cases must begin.

I, therefore, agree with the decision in the *Saltfleet* case, as far as it goes, with respect to the power of the County Court

Judge to disallow the vote of a tenant because of non-residence arising after the list was certified; but I go further and say that, in my opinion, no valid distinction can be drawn between that case and the case of the non-resident tenant who was actually non-resident when the list was certified, and afterwards so continued.

I quite agree that a scrutiny is something more than a recount. That it was intended to be something more is clearly made manifest by the circumstance that the ordinary recount, provided for in the case of municipal elections by sec. 189 of the Consolidated Municipal Act, is also applicable to the case of a vote upon a by-law, that section being one of those introduced by sec. 351—a circumstance, it seems to me, which has not always been kept clearly in mind in dealing with the subject. And that section (189) seems to make short work of another matter upon which those who hold the narrower view have occasionally built, namely, that the scrutiny is to be of the ballot papers, which, they say, is not the equivalent of a scrutiny of the votes. But throughout that section “ballot paper” and “vote” are used indiscriminately as representing and meaning the same thing—in my opinion, the only sensible view.

Then as to the third point, what is to be done with the disallowed votes? And as to that, the only question is, should they all be deducted, as the learned County Judge thought, from the affirmative votes? Middleton, J., was of the opinion, evidently, in referring the matter back to the learned County Court Judge, that the voters whose votes were disallowed could be made to disclose in what way they had voted, upon the ground that they were not voters, and therefore not entitled to the protection of sec. 200 of the Consolidated Municipal Act. But I am, with deference, unable to accept that view.

In the *Orangeville* case, 20 O.L.R. Meredith, C.J., at p. 483, suggested, without determining, that in such a case the County Court Judge should not make the deduction, but simply certify the facts to the council. That view also seems to me, with deference, to be unsound. Under sec. 371, the only person who can “determine whether the majority of the votes given is for or against the by-law” is the County Court Judge. The council

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could only act on his certificate determining the result one way or the other.

The subject is one of much difficulty. In the absence of the ballots themselves, it is impossible to arrive at a perfectly satisfactory result, nor, in my opinion, would the result be much more satisfactory if it was possible to examine under oath the voter, who, if dishonest, knowing that he could not be found out, could easily inflict further injury upon the side against which he actually voted by pretending that he voted upon that side. In some cases, perhaps, evidence, more or less reliable, might be got as to the habits and associations of the voter which might raise a presumption as to which way he had probably voted. A hotel-keeper, a bar-tender, or other liquor-seller, it might fairly be presumed, would probably vote against such a by-law, while a member of a temperance organisation, or one who, without being a member, was an abstainer in practice, would probably vote the other way. And yet such evidence could not go very far, for one object of the secret ballot is to protect the voter in the expression of his honest convictions, even where his associations and the company he keeps, and such convictions, do not, as must sometimes happen, agree.

Upon the whole, after much consideration, I am not prepared to say that the learned County Court Judge was wrong in proposing to deduct the disallowed votes from the total of those cast in favour of the by-law. That seems to have been for so long the practice that, if a change is desired, it should come through legislation.

The result is, that, making such deduction, the by-law has not received the requisite majority, and the County Court Judge should certify accordingly.

The appeal should, therefore, to the extent I have indicated, be allowed; but, under the circumstances, there should, I think, be no costs, either here or below.

MAGEE, J.A.:—Upon the scrutiny, under sec. 369 of the Consolidated Municipal Act, 1903, the County Court Judge has found 142 ballots marked in favour of the by-law and 92 against it, and has rejected 6 ballots as improperly or insufficiently



marked. But he has gone beyond mere inspection of the ballot papers, and on inquiry has found that 5 persons deposited ballots whose names were on the voters' list as tenants, but who had for more than a month before the polling been and then were non-residents of the municipality, and 4 of them in fact were non-resident at the time of the certification of the list and continuously thereafter. He considered the 5 not entitled to vote; and, having no evidence as to how they marked their ballot papers, he could not certify that the 142 votes nor more than 137 were cast for the by-law. The Divisional Court has prohibited him from certifying that the by-law was not carried, and this appeal is from that order.

Four questions arise. First, has the County Court Judge the right, upon the scrutiny, under sec. 369, to go beyond an inquiry how the ballot papers actually received and deposited were marked (involving, if necessary, an inquiry as to lost and spurious ballots), and to inquire into the right of persons to vote whose names are upon the voters' list and who have received and deposited their ballot papers? Second, if so, can he reject the votes of persons entered on the voters' list as tenants who were not in fact residents of the municipality at the time of the final revision of the voters' list, and who have continued to be non-resident until after the polling day, and who in fact had not any other right than as tenants? Third, can a person who, at the time of polling, had no right to vote, but whose name was on the voters' list, and who received and deposited a ballot paper, be required to state how or whether he marked it? And fourth, what is the result if it be found that some of those who voted had no legal right to vote, and there is no evidence as to how they voted?

The appellant, D. H. Mehring, who petitioned for the scrutiny, contends for an affirmative answer to the first and second questions, and for the negative to the third, and on the fourth that the number of illegal voters must be deemed to be possible supporters of the by-law. The respondent, Dugald McPherson, a supporter of the by-law, who applied for the prohibition order appealed from, contends for the opposite. The anomalous spectacle is presented of friends of the by-law trying to uphold

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votes which they believe to have been cast against it; while the opponents wish to have these votes rejected without inquiry on which side they were.

The first question was decided in the affirmative in 1908, by a Divisional Court in *In re Local Option By-law of the Township of Saltfleet*, 16 O.L.R. 293; and, despite the objections which have been made thereto, I cannot say that I have any doubt as to the conclusion there arrived at. As then pointed out, the history of the legislation, the reasons for it, the procedure adopted, the language copied from other enactments, the manifestly designed analogy between the proceedings for by-laws and municipal and provincial elections, and the absence of any other provision for contesting the result where the clerk declares a by-law to have been defeated, all point to the intention in 1876 to use the word "scrutiny" in the sense in which it is ordinarily and in other enactments used, and clearly to distinguish it from a mere recount on examination of the ballot papers themselves. The provision for this scrutiny was made in 1876, and has remained unchanged and it should be interpreted as then. It was then called "scrutiny of the ballot papers," as it is still; and in 1880, in 43 Vict. ch. 27, sec. 16, it was manifestly this scrutiny which was referred to as "scrutiny of the votes," as it yet is in the corresponding present section, 366, and in sec. 366a, on a similar subject. Indeed, only in secs. 366, 366a, and 369, do I find the word "scrutiny" used, though a scrutiny is manifestly intended and necessary in other proceedings. As pointed out in the *Saltfleet* case, votes and ballot papers were evidently considered interchangeable expressions.

The scrutiny, then, in my opinion, involves the inquiry as to the right to vote, and is not a mere recount which, with the right to take evidence necessary for a recount (sec. 189, 7 Edw. VII. ch. 40, sec. 4), is elsewhere provided for. But, in the inquiry as to the right to vote, regard must be had to the enactment as to the finality of voters' lists.

That brings us to the second question, as to whether the non-resident tenants could properly vote. In *Re Ellis and Town of Renfrew*, 23 O.L.R. 427, it was pointed out that the provisions in the Voters' Lists Act, 1907, 7 Edw. VII. ch. 4, sec. 24, as to

the list when finally revised being final and conclusive evidence upon a scrutiny, was intended only for provincial and municipal elections, and not for voting on by-laws—and that the list itself was not the one to be used for the latter purpose, but, it being the list of all and only those entitled to vote at elections, the clerk had to make from it the list to be used for the by-law. In no other sense is it made final for by-law purposes. But the effect for the present case is practically the same. Section 24, in clause 2, expressly excepts from the finality of the list “persons who, subsequently to the list being certified, are not or have not been resident either within the municipality to which the list relates, or within the electoral district for which the election is held, and who by reason thereof are, under the provisions of the Ontario Election Act, disentitled to vote.” In the *Orangeville* case, 20 O.L.R. 476, the learned Chief Justice of the Common Pleas considered that these last words, referring to the latter Act, controlled the whole of clause 2, and that, therefore, it does not refer to municipal elections. But, with much deference, I think he has not given due weight to the fact that the Election Act does not require residence, after the list, in the municipality, but only in the electoral district (8 Edw. VII. ch. 3, secs. 19 and 95, and forms 17, 18, 19); whereas the Municipal Act (in secs. 86 and 112) does require residence in the municipality; and the reference in clause 2 to the latter would be meaningless if the clause is inapplicable to municipal elections. I am, therefore, of opinion that clause 2, as far as the word “relates,” must in this case be applied.

Even assuming that to be so, the Divisional Court considered that the votes of the 4 tenants referred to could not be struck off, as they had not changed their status, and the list was conclusive that they were resident tenants. It has not been contended that the fifth should not be struck off if the list is not final. The result would be that he who was longer a resident would be in a worse position than those who had severed their connection with the municipality long before, and who in fact were wrongfully on the list, while he was rightfully on it. I find nothing in the statute to force us to such a conclusion. The words are, plainly, “Persons who subsequently to the list being

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certified are not or have not been resident." It does not say, "persons who subsequently have become not resident or persons who have subsequently ceased to be resident," but "persons who subsequently are not resident." I confess, with much deference to the opinions expressed, that I cannot see any warrant for adopting any other than the ordinary interpretation, or striving for a result so opposed to the policy of the Act against non-residents having a voice in the municipality's affairs. Reference has been made in some of the cases to the judgment of the learned Chancellor in the *Saltfleet* case as if he had expressed an opinion that a continued non-residence would not disqualify; but I do not read it as saying more than that subsequently occurring non-residence would disqualify, which is evidently all that he meant to deal with. In my opinion, the learned County Court Judge rightly held all these 5 votes to be invalid.

It is not suggested that there is any means of proving on which side they or any of them were cast unless by calling the voters themselves to disclose it. If any one or more of them had intentionally displayed his ballot after marking it, though he might be punished for doing so, I do not see why any one who saw it and who was not sworn to secrecy should not be admitted to prove, if he could, how it was marked.

In the absence of evidence of that sort, we come to the third question. Section 200 of the Consolidated Municipal Act, 1903, declares that no person who has voted at an election shall, in any legal proceeding to question the election or return, be required to state for whom he has voted. Section 351 makes that section apply also to voting on by-laws. The provision in sec. 200 goes back to 1874 (38 Vict. ch. 28, sec. 34). Like provision was made in 1874, as to provincial elections, by 37 Vict. ch. 5, sec. 32 (now 8 Edw. VII. ch. 3, sec. 166), and as to Dominion elections by 37 Vict. ch. 9, sec. 77. Section 200 should be construed in the same way as those enactments. Up till 1906, the provincial election law was such that if, upon a scrutiny, it was found that a person not entitled to vote had deposited a ballot paper, it could be traced and inspected by the Court and rejected. There was and is no lawful way of doing so in municipal



or Dominion elections, nor since 1906 in provincial elections. Thus it was the declared policy of the Legislature that, in case of necessity, upon a scrutiny there should be no secrecy for an invalid vote. Yet, side by side with that policy, there was this broad provision that "no person" who voted should be "required to state how he voted." It is not even limited by saying "no voter." To some extent, it might be said that the very provision for unearthing the ballot would indicate that the voter could not be asked what it would shew. In rendering the ballot now untraceable legally in provincial elections, a scrutiny has not been done away with (see sec. 24, already referred to); and the necessity for evidence of some other sort as to the marking of the ballot is greater; but the wording of the section protecting the voter remains the same, and must still have the same interpretation. Indeed the change has emphasised the policy of secrecy. But the fact that, when the provincial Act 37 Vict. ch. 5, sec. 32, was enacted, entitling the voter to keep silent, the law made other provision for obtaining the evidence, is, I think, a reason for giving the Ontario law even a more liberal and not a less liberal interpretation in favour of the voter than the Dominion law which had the same wording.

The Ontario municipal provision (now sec. 200) should have the same interpretation as that in the Ontario Election Act. Until the case of the *Orangeville* by-law, 20 O.L.R. 476, the precise question here does not seem to have arisen. There have been several cases in which lawful voters were not allowed to be asked or to state on oath how they had marked their ballots. In the *Lincoln Election Case*, 4 A.R. 206, it is pointed out that the protection of the statute is around the voter until his vote is proved invalid—but it was not absolutely decided that, if invalid, the protection would be removed. I fully agree with the view of Mr. Justice Britton in the present case (25 O.L.R. at p. 296), that, as a vote may have been given in perfect good faith, although it turns out that the right to it did not exist, it is important that, unless the law clearly provides otherwise, the person honestly casting it should have the benefit of secrecy. The opinions given upon the Dominion Act, although referring to rated votes, are wide enough in their terms to include those

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turning out to be invalid; and, if voters willing to tell how they voted are excluded from doing so by the policy of the law, much more should those who, as probably in this case, would be unwilling to do so. I am of opinion that they cannot be asked. There is much, however, to be said in favour of the contrary view. In the United States the result of decisions is thus stated in 15 Cyc. 424, under "Elections:" "And it would seem that the same considerations of public policy which relieve the voter himself from being compelled to testify for whom he voted should prevent other proof of that fact. But this protection is extended to legal voters only. When it has been established that a voter was not a legal elector, any person having requisite knowledge may testify as to the person for whom he voted, and he may be compelled himself to disclose for whom he voted, unless he claims the other and different privilege of refusing to criminate himself. . . . According to the weight of authority the exemption from obligation to disclose the character of his vote can be claimed only by the voter himself. But on the other hand it has been held that in an election contest voters cannot testify at all as to how they voted. Where it does not appear from direct testimony for what candidate an unqualified voter voted, the fact may be shewn by circumstantial evidence."

The fourth question is one which might arise upon any Dominion, provincial, or municipal election, as well as upon any by-law. It is not certain and cannot be made certain how any of the 5 illegal votes were cast. They may have been in favour of the by-law. If so, it would only have 137 supporters, and therefore not the requisite three-fifths. If any one of the 5 voted against it, then it would certainly have 138 against a possible 91, which would be sufficient. On the affidavits there is every probability that at least two, who were well known opponents, voted against it, but probability is not enough. The question turns upon the issue involved.

In the *Lincoln* case, 4 A.R. 206, at p. 212, the Court said: "The solution of this question seems to follow from a consideration of the issue raised. The respondent has been returned as duly elected. The petitioner, in claiming the seat for Mr. Neelon" (the unsuccessful candidate), "undertakes to

prove that he received the majority of legal votes. That proposition he is bound to establish affirmatively. Where it is sought to diminish the majority of the respondent" (Mr. Rykert, who had been returned as elected) "by a vote, two things must be proved: firstly, that the voter had no vote; and secondly, that he assumed to vote for the respondent. In the case put, the second is incapable of proof, and the petitioner therefore fails to prove that the vote was cast for Rykert and not for Neelon." Similarly in the United States the result of the authorities is thus stated in 15 Cyc. 416: "In a statutory contest at the suit of a defeated candidate, the certificate of the board of canvassers is *primâ facie* evidence of the result, and the contestant, whatever may be his ground of complaint, has the burden of establishing it. Where the validity of the returns is not attacked on the ground of fraud, it is not enough to shew that illegal votes were cast; it must be shewn that a sufficient number of such votes were cast for the successful candidate to change the result."

If the scrutiny could be looked upon as an appeal from the clerk's certificate that the by-law was carried, and as an affirmative assertion that more than two-fifths voted against it, then this case would be governed by the principle of the decision in the *Lincoln* case, and the onus would be upon the opponents of the by-law to shew that the clerk's return was wrong; and, failing affirmative proof of it by shewing that all 5 persons voted for the by-law, the clerk's return of 141 against 92 would stand, except as amended by the Judge by the addition of the one improperly rejected ballot.

But the scrutiny cannot, I think, be so looked upon. The question is not the same as the question between two candidates, where each asserts that he has been elected, and not merely that the other has not been elected. The scrutiny may be asked for by any elector, and he need not even have voted. He has only to shew to the Judge reasonable grounds for a scrutiny, and does not need to assert that a different result should be arrived at. He simply asks a more certain result. It might be that mistakes in one polling subdivision would be offset by those in another, the ultimate result being the same. He might

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be a supporter of the by-law who believed that a greater majority should be declared. In such a case, he should not be deemed to be asserting that the bad votes were cast against the by-law, and, because he failed in proving it, meet the result that they should be assumed not to have been against it. The petitioner for a scrutiny does not, I think, raise any issue other than the original one—whether or not three-fifths of the legal voters have decided for the by-law—although he does render himself liable to costs.

Such a petitioner is not in the same position as one making an application to quash a by-law. It might well be that the onus would be upon the latter to shew that the by-law was defeated; and, if he failed in affirmative proof, the by-law would stand. Whatever the result would be upon such an application to quash, upon a scrutiny under sec. 369 the whole question is open, and the Judge is not to inquire merely as to the allegations made in the petition to justify the scrutiny; but, having been satisfied that there was reasonable ground for one, he is, under sec. 371, to determine, not the truth of those allegations, nor the truth of the clerk's return, but "whether the majority of the votes given is for or against the by-law"—that is, the necessary majority of legal votes—and he is to certify the result to the council. The Judge can arrive at the result only upon the evidence before him, which is here that five persons voted who should not have done so, and they may or may not all have voted for the by-law; and, therefore, he cannot say that it has been carried.

In my opinion, therefore, the prohibition should not have been granted, and the appeal should be allowed without costs.

I regret to have to come to this conclusion in this case, because there is every reason to believe that the by-law was lawfully carried; but it rests with the Legislature to say whether it will permit evidence as to the way in which illegal voters marked their ballots. The result of the present condition of the law is, that a man who has no vote may first have his vote added to those opposing a by-law, and then deducted from the number of those supporting it, and thus count twice as much as that of the lawful voter.



MEREDITH, J.A. (dissenting):—This case involves the question whether a scrutiny, under sec. 369 of the Consolidated Municipal Act, 1903, is a scrutiny of votes polled, and consequently a controverted election trial; or is, as it purports to be, a scrutiny of “the ballot papers” only.

The question arose in the case of *In re Local Option By-law of the Township of Saltfleet*, 16 O.L.R. 293, in which a Judge had held that the enactment meant no more than it, in plain words, said—“a scrutiny of the ballot papers:” but, upon an appeal to a Divisional Court, that ruling appears to have been differed from to some extent, but to just what extent is not made very plain. Boyd, C., dealt with the question in an *addendum* only to his judgment, in which he intimated that the case had not been very fully argued. Mabee, J., agreed with him, without giving any reasons: but Magee, J., dealt with this question at considerable length, and went the full length of holding the scrutiny to be an unlimited scrutiny of the votes polled.

For several reasons, I am quite unable to agree with him in that conclusion.

In the first place, it is in the teeth of the plain and simple words of the legislation, “a scrutiny of the ballot *papers*,” and I decline to attribute to the Legislative Assembly a lack of knowledge of the meaning of such words, under any circumstances; but the more so, because, when a scrutiny of votes polled has been so meant, that representative body has found no difficulty in providing for it in quite appropriate words: see sec. 76 of the Ontario Controverted Elections Act, R.S.O. 1897, ch. 11: the words there employed being, “a scrutiny of the votes polled at the election.” It will be found safer, in all cases, to attribute to the Legislature as complete a knowledge of plain English as that which most of us possess.

In the next place, if this be not a scrutiny of the “*papers*” only, but, in truth, a controverted election trial, then a special tribunal is constituted for the trial of such a case, and, according to the general rule, the finding of such a tribunal is not subject to review elsewhere, unless some provision for appeal or review is made in the legislation, and there is, in this legisla-

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tion, no such provision in any shape or form. I cannot think that any one will seriously contend that the Legislature meant that the judgment of a single County Court Judge, upon such a proceeding, should be final and conclusive as to the validity of any by-law—money or local option—which may be the subject of the voting, the ballot papers of which are to be so scrutinised. On the other hand, if such general rule is not to apply—and generally the cases seem to have been dealt with as if it did not—then we should have the farce of a costly scrutiny to no binding purpose; a costly scrutiny to be gone over anew in any attack which might be made upon the by-law in the usual way. So that, whichever way it is looked at, it seems hardly possible that reasonable men could have desired such an effect. Whilst, if the scrutiny be restricted to the ballot papers—in the nature of a recount—it would be quite reasonable, and quite in accord with the provisions for a speedy recount, which, by legislation, is now commonly given after all elections.

Again, the proceedings must be commenced within the usual time for beginning recount proceedings, fourteen days after the declaration of the result of the poll; whilst the time-limit for motions to quash is, generally speaking, not less than a year. Preparing for a scrutiny of the votes would ordinarily require more time than preparing for attacking the by-law on other grounds; and, beside this, no provision is made for notice of objections to voters; nor is there anything to indicate, in any manner whatever, that the qualifications of voters, specially to be objected to, or the qualification of every voter who voted, is to be, or may be, inquired into in this hurried fashion: on the contrary, the Judge is to proceed upon an "*inspection of the ballot papers*," not an inquiry into the qualification of voters, and upon such evidence as he may deem necessary—evidence as to ballot papers, not as to qualification of voters, which, upon a scrutiny of votes polled, would not be in the mere discretion of the Judge, but would be such admissible evidence as the parties saw fit to adduce.

And again, the ruling in the *Saltfleet* case has been frequently questioned, so that hitherto the weight of judicial opinion greatly preponderates against the view that a scrutiny of ballot

papers is a scrutiny of the votes polled, involving an inquiry into the qualifications of the voters.

And lastly, even if the words be considered of doubtful import, is a Court of such extensive jurisdiction, and one of such extraordinary power—whether wholly conclusive or wholly inconclusive, as I have before mentioned—to be created on doubtful language?

And, if this is not enough, look at the result: the by-law is to be judicially declared to have been defeated at the poll—with all the binding consequences of such a defeat of a local option by-law at the polls—though in truth it may have been, and in all probability was, carried: an injustice arising wholly from a disregard of the plain words of the legislation; an unfortunate attempt to improve upon well-considered legislation. Let the scrutiny be, as the Legislature has plainly said, of the ballot papers, and you have certainty, finality, and justice: certainty and finality in the County Court Judge's scrutiny of the ballot papers, and justice from the ordinary courts, with the usual rights of appeal, in making the scrutiny of the qualifications of voters, and in, in such a case as this, setting aside the by-law because of the inconclusive character of the poll; leaving it to the contestants to try it over again if they choose to; which is the only just consequence of an indecisive election poll or any race.

Against all these, and other, reasons for treating the Legislature as if its members knew the meaning of plain words, these things have been urged:—

In the first place, it is said that the provision, contained in sec. 372, giving to the Judge, upon the scrutiny, the like power and authority as those which he has upon the trial of the validity of an election, shews that each is really an election trial. But there is no warrant for any such contention: the power and authority is expressly limited to matters properly “arising upon the scrutiny.” It was necessary to confer power and authority to enable the Judge to prosecute the inquiry, and, “upon inspecting the ballot papers,” to determine, in a summary manner, “whether the majority of the votes given is for or against the by-law”, and what shorter or better method could be

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adopted than in saying that, so far as they are applicable to a scrutiny of ballot papers, the procedure upon an election trial shall be applicable, as this section in effect provides?

Then it is said that the Legislature could not have meant a mere recount, because it had, in an earlier section of the Act, provided for a recount in municipal elections (sec. 189): and had, by another section (sec. 351), made this section applicable to voting on money and local option by-laws. But, in truth, that is not so; nor, if it were, would such a consequence necessarily follow. Under section 351, secs. 138 to 206, except sec. 179, are incorporated with the provisions respecting the poll in regard to money by-laws; and local option by-laws are, under the local option enactments, put in the same category as money by-laws; but those sections are so incorporated only in "so far as they are applicable;" and the rule is, that, where a special enactment provides for a certain case, the provisions of a general enactment covering it also are inapplicable: so that, here, it seems to me to be plain that, the provision of sec. 369 specially applying to such a by-law, sec. 189 is inapplicable, and so expressly excluded under the plain words of sec. 351. And there is abundant reason for that, for money by-laws are by-laws of the most important character, and the provisions of sec. 369 are of a wider and more protective character than those of sec. 189; the one is a scrutiny of the ballot papers, the other a recount of the votes only. Upon a scrutiny of the ballot papers the question of the validity of each ballot may be inquired into; a thing of no small importance when the corrupt dealing with ballot papers, even by sworn election officers, which has been only too frequently proved in election cases some time ago, is borne in mind.

And, lastly, it is said that the Legislature has used, elsewhere, the words "ballot papers" and "votes" indiscriminately, and so may be taken to have meant a scrutiny of the votes polled, and a scrutiny of the widest character respecting such votes, when it has said only that it shall be a scrutiny of ballot papers. Again I challenge both the accuracy of the statement and the logic of the conclusion if the statement were true. Section 189 is again appealed to; but, instead of that section prov-



ing indiscrimination, from the beginning to the end of it it shews a clear discrimination, knowledge, and expression of the obvious difference between votes polled and ballot papers. The Judge is to examine the ballot papers and recount the votes recorded upon them; and this discrimination is shewn throughout the section, with one possible exception, which appears in sub-section (6), where the words "recount all the votes or ballot papers" are used; but even these words shew a discrimination, and would be very exact if the word "or" were "and," because not only is it necessary to count the votes but also to count the ballot papers, unused and rejected, as well as used and become evidence of a vote. If the Legislature knew not the difference between a vote and a ballot paper, why use both expressions? The error in asserting that the words "ballot paper," as used in sec. 369, mean vote, ought surely to be evident when it is borne in mind that there are *unused* ballot papers which must be scrutinised and counted, as well as, also, used and spoiled ballot papers, to be so dealt with; as well as any corruptly substituted or corruptly marked or re-marked ballot papers; for the whole subject of ballot papers comes within the scrutiny under sec. 369, though not within the recount under sec. 189.

I can, therefore, find no excuse for attributing to the Legislature want of knowledge of the meaning of the plain and simple words "ballot papers;" and I venture to assert that no existing enactment gives any sort of excuse for doing so.

If this be so, then the County Court Judge had no power to enter upon a scrutiny of the votes in regard to the qualification of the voters, and was rightly prohibited from doing so; and it is quite immaterial that the grounds upon which the order was made were erroneous.

The next question considered by the Divisional Court was, whether the voters in question were qualified to vote; but I am at a loss to understand what power there was to deal with such a question in prohibition proceedings: if the County Court Judge had jurisdiction to enter upon such an inquiry, whether he reached a right or a wrong conclusion is surely not a question that can be dealt with in prohibition; prohibition is directed against an usurpation of jurisdiction only: we must not assume

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the power which would rest only in a court having appellate jurisdiction over such proceedings; and, as I have before intimated, no appeal is given from the County Court Judge.

But, as a majority of the members of this Court considers that there is power here to consider the question, I am bound to accept that view and to express my opinion upon it; and my opinion is, that upon this question also the order of the Divisional Court was right; but I would support it also on different grounds.

Whether these voters were qualified or not depends upon sec. 24 of the Ontario Voters' Lists Act, 7 Edw. VII. ch. 4.

The names of all of them appeared as duly qualified voters in the certified list of voters referred to in that section, which provides that such list shall, upon a scrutiny such as that in question, be final and conclusive as to such qualification to vote. There can be no doubt, nor is there any dispute, as to that; but it is contended that, under sub-sec. 2 of that section, such persons as these voters are taken out of its provisions. The subsection is in these words: "2. *Persons who*, subsequently to the list being certified, are not or have not been resident either within the municipality to which the list relates, or within the electoral district for which the election is held, *and who* by reason thereof are, *under the provisions of the Ontario Election Act*, disentitled to vote;" and, under the section itself, such persons are excepted out of its provisions.

But, how is it possible to bring these voters, *at a municipal poll*, within its provisions? As plain as any words in the English language can make it, this exception applies only to voters at a provincial election; those who, by reason of such non-residence, under the provisions of the Ontario Election Act, are disentitled to vote.

It is said that non-residence in a municipality does not disentitle under the provisions of the Ontario Election Act, that it is enough under it that the residence be within the electoral division: but what has that to do with the question? To say that, because this provision cannot be made wholly applicable to that which alone the Legislature has said it shall apply, any Judge may apply it to something else, to which he may think it

ought to have been made applicable, but obviously has not, is surely legislation, not adjudication. We ought not to forget that we are not now legislators, nor even here acting as statute-revisers.

Can any one, in reason, say that the sub-section is not limited to those who are disentitled under the Ontario Election Act: and can any one in reason say that any of these persons are so disentitled? Surely not.

Nor is the sub-section inapplicable to those to whom it is so limited. It plainly excepts all those who are disentitled under the provisions of the Ontario Election Act; and it is quite immaterial whether the disjunctive words "within the municipality" are or are not superfluous or otherwise useless.

It may, or may not be, that the Legislature intended to make the sub-section applicable to municipal elections and other municipal polls; but that is quite immaterial here, because it is unquestionably certain that, whatever was intended, that was not done.

The provisions of sec. 86 of the Consolidated Municipal Act of 1903, regarding a tenant's residence, are not repugnant in any way to those of sec. 24 of the Voters' Lists Act; if they were, they would be equally repugnant in respect of other wants of qualification, such, for instance, as to the voter being a British subject: the two enactments must be read together, and, so read, sec. 24 makes the voters' lists conclusive evidence, upon a scrutiny, of qualification in all these respects. The qualifications are all necessary, but the inquiry under the Voters' Lists Act is a conclusive consideration of the question of their existence or absence.

The cases upon this subject have, I think, all been rightly decided; it is for the Legislature, not the Courts, to cure the want of expression including municipal electors in sub-sec. 2, if it see fit.

For a like reason, I am obliged to express my opinion upon the last question dealt with in the Divisional Court, a question which I should hardly have thought arguable: to give effect to the order of Middleton, J., in it, would be to refuse to be guided by the plain words of legislative enactment, and to fly in the

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face of the whole trend of legislation regarding the secrecy of the ballot, without any sort of authority for it.

I find it impossible to understand how it can truly be said that a person who has voted, and whose vote has been counted, is not a person who has voted, merely because he may not have been a qualified voter. Effect ought to be given to the plain meaning of plain language.

The numbered ballot was in force for years in provincial elections, not for the purpose of ascertaining how good votes were cast, but for finding out how votes proved to have been invalid were cast, so that they might be deducted from the proper side; but even that was considered such a menace to the secrecy of the ballot that it was wiped out of the statute-law entirely.

But, if there were not these things against the order made in this respect, in the first instance, the cure would seem to me to be worse than the disease: one who, having no vote, voted, and probably swore "his vote in," would not be unlikely, when obliged to say how he voted, to tell an untruth about it; and so the double wrong would most likely be done; the bad vote would remain on the side for which it was cast, and a good one be taken from the opposite side. It would be absolutely impossible to trace the ballot, and highly impossible that any one but the voter would be able to give any testimony as to the way in which he actually voted.

Beside all this, shewing how one man, or several men, voted, may, in some cases, shew how others voted, and absolute secrecy seems to be needful to give the required feeling of absolute security; and nothing should be done to throw doubt upon the absolute secrecy of the ballot, where voting by ballot is in force. To compel any one to disclose his vote, or rather to answer upon oath any question as to how he voted, would in another way lead to the disclosure sometimes of the votes of qualified voters, for Judges are not infallible; qualified voters may erroneously be held to be unqualified; and doubt would, in any case, be thrown upon that essential of the ballot system, a feeling of absolute security in absolute secrecy.

I would dismiss the appeal.



MACLAREN, J.A., also dissented, agreeing with the opinion of  
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*Appeal allowed; MACLAREN and  
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*Life Insurance—Benefit Certificate—Beneficiary—"Adopted" Daughter—Death of—Claim by Infant Children of—Rules of Insurance Society—Insurance Act, R.S.O. 1897, ch. 203, sec. 151(3)—Law of Ontario as to Adoption—1 Geo. V. ch. 35, sec. 3—Preferred Beneficiaries—Endorsement in Favour of Beneficiary for Value—Validity—Evidence—Next Friend of Infants—Status—Certificate Endorsed as Security for Advances—Inquiry as to Amount Advanced.*

Section 3 of 1 Geo. V. ch. 35 is derived from 12 Car. II. ch. 24, sec. 8, and carries the law no further than that enactment. Its effect is not to take away any of the rights of a father in respect of the custody of his child, but to enable the father to take away the common law rights of others; the statute does not exclude the right of the father himself; he cannot get rid of his parental right irrevocably by an agreement; such a deed or agreement is revocable, even by will. The law of Ontario, strictly speaking, knows nothing of adoption; and the term "legal adoption" has no meaning, in the proper use of the words.

*Re Davis* (1909), 18 O.L.R. 384, followed.

*Re Hutchinson* (1912), 26 O.L.R. 113 (since reversed), not followed.

In 1901, R. became a member of a benefit society, the Royal Arcanum, incorporated in the State of Massachusetts but doing business in Ontario, and the society issued to him in Ontario a benefit certificate whereby it agreed "to pay . . . to L. H. (adopted daughter) a sum not exceeding \$1,500 in accordance with and under the laws governing said fund"—that is, the beneficiary fund of the society—"upon satisfactory evidence of the death of said member . . ." L. H. died in 1909, leaving infant children. Thereafter, R. endorsed upon the certificate, under his signature and seal, a direction that all benefits thereunder should be paid to the defendant, "who for many years has advanced money to me and kept up the premiums, and who is a holder of this certificate for value." R. died a widower and childless in 1911. The insurance or benefit moneys were claimed by the defendant under the endorsement, and also by the plaintiffs (next friend), on behalf of the children of L. H., under the rules of the society:—

*Held*, that, as the society was not incorporated under the Benevolent and Provident Societies Act, R.S.O. 1897, ch. 211, the insurance moneys were not payable "to the person or persons entitled under the rules" of the society (sec. 12); sec. 151(3) of the Insurance Act, R.S.O. 1897, ch. 203, was applicable (sec. 147); and the rules of the society must give way to the provisions of the statute so far as inconsistent therewith.

*Gillie v. Young* (1901), 1 O.L.R. 368, followed.

And *held*, that the infants were not the designated preferred beneficiaries of R.; they were not preferred beneficiaries at all, within the meaning of the statute, R. not having been their grandfather in a legal sense; and he made a new beneficiary under the provisions of the law in that regard.

*Held*, also, that the plaintiffs, as next friend, were not entitled to the infants' money; and the infants were not entitled to the money in any case.

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*Held*, also, that the endorsement on the certificate was valid under the statute; and the plaintiffs' attack upon it, on the grounds that it was not read to or by R., and that it was ignored and treated as null and void by both R. and the defendant until the death of R., failed upon the evidence; and the defendant was entitled to receive the amount due upon the certificate, unless the plaintiffs could shew that his advances were less than that amount.

*Semble*, that the infants would have been entitled to the money under the rules of the society, if it had been considered that the rules should prevail.

ISSUE as to certain moneys paid into Court by a benefit society.

April 29. The issue was tried before RIDDELL, J., without a jury, at London.

*W. G. R. Bartram*, for the plaintiffs.

*J. M. McEvoy*, for the defendant.

May 4. RIDDELL, J.:—T. R. Rhoder, a manufacturer in a small way in London, took out, on the 29th August, 1901, a certificate in the Royal Arcanum, whereby that organisation agreed "to pay . . . to Lucy Hendershot (adopted daughter) a sum not exceeding \$1,500 in accordance with and under the laws governing said fund, upon satisfactory evidence of the death of said member . . . provided that said member is in good standing at the time of his death, and provided also that this certificate shall not have been surrendered by said member and another certificate issued at his request, in accordance with the laws of the Order." (Considerable argument was based upon the clause "in accordance with the laws of the Order," but it is clear that these words refer simply to a certificate subsequently to be issued, and that they have no relevance in the present inquiry.)

Lucy, having been married to W. P. Hendershot, died in 1909, leaving her surviving four infant children and her husband. Thereafter, Rhoder made the following endorsement upon the certificate:—

"The within named beneficiary, Lucy Hendershot, having died, I direct that all benefits under the within certificate be paid to Urban A. Buchner, who for many years has advanced money to me and kept up the premiums, and who is a holder of this certificate for value.

“Witness my hand and seal this 6th day of July, 1909.

“Witness:

“M. Isabel Blankinship. Thomas R. Rhoder. (L.S.)”

Rhoder died a widower and childless in 1911; a claim was made by Buchner that he was entitled to the amount of the insurance—a claim was, however, made on behalf of the children of the deceased “adopted daughter.” The Royal Arcanum paid the money into Court; the Fidelity Trust Company took out letters of administration with the will annexed of the estate of the deceased Rhoder; and, upon application, an interpleader order was made by the Master in Chambers.

The issue came on for trial before me at the non-jury sittings at London during the present week—I heard all the evidence and reserved judgment.

Every suggestion of amendment to the form of the issue was strenuously combatted by counsel for the plaintiffs; and I must accordingly deal with the issue exactly as I find it.

In the issue the Fidelity Trust Company are plaintiffs and Buchner defendant.

“The plaintiffs affirm and the defendant denies: (1) that . . . infant children of Lucy Hendershot . . . are the designated preferred beneficiaries of their grandfather . . . T. R. Rhoder by certificate . . . issued by . . . the Royal Arcanum . . . ; (2) that the plaintiffs, as next friend to the said infants, . . . are entitled to payment out of Court of the said sum; (3) that, in the alternative, . . . the plaintiffs, as administrators . . . of . . . T. R. Rhoder, are entitled to the said sum, notwithstanding the endorsement dated the 6th day of July, 1909, on the said certificate, in favour of the said defendant, in that the said endorsement was not read to or by the said T. R. Rhoder, and was ignored and treated as null and void by both the said T. R. Rhoder and the said defendant until the death of the said T. R. Rhoder. . . . And the defendant affirms and the plaintiffs deny: (1) that the said defendant is the owner of the . . . certificate and entitled to the proceeds . . . paid into Court by virtue of the fact that the said insurance certificate is personal property reduced into possession by the defendant, and owned by him as an innocent purchaser for

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value, and by virtue of an endorsement upon the said certificate made by T. R. Rhoder to . . . Buchner for value; (2) that the defendant is entitled to the said sum paid into Court as the proceeds of the said certificate."

The claim on behalf of the infants is based upon the rules of the society. Section 332 says: "In the event of the death of all the beneficiaries designated . . . before the decease of such member, if he shall have made no other or further disposition thereof, as provided in the Laws of the Order, the benefit shall be disposed of as provided in section 330. . . ." As sec. 326 provides that a certificate shall not be made payable to a creditor, or be held or assigned in whole or in part to secure or pay any debt which may be owing by the member; and sec. 327 provides that any assignment of a benefit certificate by a member shall be void: it is argued for the plaintiffs that the member has not made a disposition "as provided in the Laws of the Order," and, consequently, by the provisions of sec. 332, sec. 330 applies. This is as follows: "If at the time of the death of a member . . . any designation shall fail for illegality or otherwise, then the benefit shall be payable to the person or persons mentioned in class first, sec. No. 324, if living, in the . . . order of precedence by grades as therein mentioned, the persons living of each precedent grade taking in equal shares *per capita*, to the exclusion of all persons living of subsequent enumerated grades, except that in the distribution among persons of grade second the children of deceased children shall take by representation the share the parent would have received if living. . . ."

Section 324: "A benefit may be made payable to any or more persons of any of the following classes only:—

"Class First.

"Grade 1st.—Member's wife.

"Grade 2nd.—Member's children and children of deceased children and member's children by legal adoption.

"Grade 3rd.—Member's grandchildren."  
(Enumerating 13 grades.)

"In either of which cases, no proof of dependency of the beneficiary designated shall be required; but in case of adoption,



proof of the legal adoption of the child or the parent designated as the beneficiary, satisfactory to the Supreme Secretary, must be furnished before the benefit certificate can be issued.

“Class Second.

“(1) To the affianced wife . . .”

(Enumerating five grades.)

If (a) the deceased Mrs. Hendershot was the member's child “by legal adoption,” within the meaning of grade second of class first in sec. 324; (b) the member did not make any “other or further disposition” of the certificate, “as provided in the Laws of the Order;” and (c) the provisions of the Laws of the Order are to prevail—it is, to my mind, clear that the children are entitled to the money.

It is argued by the defendant that Lucy Hendershot was not a child “by legal adoption.”

In *Re Davis* (1909), 18 O.L.R. 384, at pp. 386, 387, it is said, “The law of England, strictly speaking, knows nothing of adoption;” and “parents cannot enter into an agreement legally binding to deprive themselves of the custody and control of their children; and, if they elect to do so, can at any moment resume their control over them.” In *Re Hutchinson*\* (1912), 26 O.L.R. 113, at p. 115, apparently doubt is cast upon these propositions—and it is suggested that the decision in *Re Davis* was as it was because the attention of the Court was not directed to the Act 1 Geo. V. ch. 35, sec. 3, taken from R.S.O. 1897, ch. 340, sec. 2. Of course, 1 Geo. V. ch. 35 had not been passed when *Re Davis* was decided: but the statute from which it was ultimately derived had been in force in England for two hundred and fifty years and in our country since Upper Canada became a Province, if not before: *Anon.* (1858), 6 Gr. 632; *Davis v. McCaffrey* (1874), 21 Gr. 554; and other cases. It has not given occasion for many decisions in Upper Canada; but the law is of every day application.

Our statute is derived from 12 Car. II. ch. 24, sec. 8, and carries the law no further than that statute. The effect of the statute is not (I speak with great deference) to take away any

\*The judgment of the Chancellor in *Re Hutchinson* was reversed by a Divisional Court on the 25th June, 1912: 3 O.W.N. 1552.

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of the rights of the father, but to enable the father to take away the common law rights of others—it does not exclude the right of the father himself, but that of “all and every person or persons claiming the custody or tuition of such child or children as guardian in socage, or otherwise.” And, accordingly, as Lord Esher says in *The Queen v. Barnardo* (1889), 23 Q.B.D. 305, at pp. 310, 311, “The parent of a child, whether father or mother, cannot get rid of his or her parental right irrevocably by such an agreement. . . . As soon as the agreement was revoked, the authority to deal with the child would be at an end.”

The statute is considered in Blackstone, vol. 1, p. 362; Co. Litt. 88(b), and Hargrave’s notes; Eversley, 3rd ed., pp. 618, 619, 620, 622, 646, 743, 744; Simpson, 3rd ed., pp. 95, 105, 111, 113, 183, 184, 186, 188 *sqq.* And I do not find any case or text in which it has been thought that the statute applied except after the death of the father.

The ordinary rule is, that there cannot be a guardian in the lifetime of the father: *Ex p. Mountfort* (1808), 15 Ves. 445; *Barry v. Barry* (1828), 1 Molloy 210; *Davis v. McCaffrey*, 21 Gr. at p. 562.

But, not to press that point, a deed under the statute has been called by Lord Eldon, L.C., “only a testamentary instrument in the form of a deed:” *Ex p. Earl of Ilchester* (1803), 7 Ves. 348, at p. 367. Such a deed has been held, from within a few years of the passing of the statute, to be revocable even by a will.

In *Shaftsbury v. Hannam* (1677), Finch’s Reports (not Finch’s Precedents) 323, the dispute was between the plaintiffs, claiming under a deed poll, and the defendant, claiming under a subsequent will. The Lord Chancellor, Lord Nottingham, held that the widow seemed to have a great probability of law on her side, and refused to disturb her in her guardianship, unless she refused to prove that she was not excluded by the terms of the statute (referring to difference of religion—now of no consequence, and, happily, but of interest historically).

In *Lecone v. Sheires* (1686), 1 Vern. 442, Lord Jeffreys, L.C., would not allow the removal of a guardian appointed by deed,

where the deed contained a covenant not to revoke, and the deceased parent had died in debt to the guardian so appointed.

In *Ex p. Earl of Ilchester*, 7 Ves. 348, Lord Eldon, L.C., says (p. 367): "The question takes this turn; whether, as it is necessary under the statute, that the instrument, whether a deed, which I take to be only a testamentary instrument in the form of a deed, or a will, should be executed in the presence of two witnesses . . . it is therefore also necessary, that any instrument revoking that shall be executed in the presence of two witnesses. . . ." Thus making no distinction between the case of a deed and of a will, either being revocable.

I cannot find any contrary intimation or suggestion of opinion as to the meaning and effect of the statute. See also 1 Cyc. 917.

The English law is substantially the same as ours, and the decisions there are of authority with us—and I am unable to recant the opinion, expressed in *Re Davis*, that the law of Ontario, strictly speaking, knows nothing of adoption. As the Chancellor has not actually decided to the contrary, I am at liberty to follow my own judgment.

It follows that in Ontario there can be no "legal adoption," in the strict and proper use of the words, as there can be in many of the States of the Union: 1 Cyc. 918. The Royal Arcanum is an organisation which covers many of the United States, as well as Canada; and its rules are made of general application.

No doubt, it was in view of the difficulty of framing any general rule as to "legal adoption" that the determination of the fact of "legal adoption" was left to the Supreme Secretary (sec. 324), and the provision was made that the proof of legal adoption was to be satisfactory to the Supreme Secretary. In my view, the Supreme Secretary was made the judge as to "legal adoption"—particularly in a country where "legal adoption" has no meaning in the proper use of the words. I think his decision is final. In our Province, I think that what the Supreme Secretary decides to be "legal adoption" is "legal adoption" for the purposes of the insurance—no statute or other law of the Province being violated.

As the benefit certificate cannot be issued until the Supreme

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Secretary is satisfied, it must be taken that the Supreme Secretary has decided that Lucy Hendershot was the adopted daughter, or to use the words of the rules, the child by legal adoption, of the member: *Ancient Order of United Workman of Quebec v. Turner* (1910), 44 S.C.R. 145.

(b) I think it equally clear that Rhoder made "no other or further disposition thereof as provided in the Laws of the Order;" sec. 327 makes an assignment void, and sec. 326 declares that a certificate is not to be held or assigned to secure or pay any debt; and the provisions of sec. 333, permitting a change of beneficiary to be effected by surrender of certificate and payment of a small fee, have not been taken advantage of.

(c) The defendant appeals to the Act of 1904, 4 Edw. VII. ch. 15, sec. 7: but that has no application—it applies only in the case of preferred beneficiaries—husband, wife, children, grandchildren, or mother: R.S.O. 1897, ch. 203, sec. 159; and adopted children are no more "children" than are godchildren, or than the "wife" in *Crosby v. Ball* (1902), 4 O.L.R. 496, or *Deere v. Beauvais* (1906), 7 Q.P.R. 448, was a wife.

The statute to apply is R.S.O. 1897, ch. 203, sec. 151(3): "The assured may designate . . . the beneficiary . . . and may . . . by the . . . like instrument from time to time . . . alter . . . the benefits . . . or substitute new beneficiaries . . . ." (6) "And if all the beneficiaries die in the lifetime of the assured . . . the insurance money shall form part of the estate of the assured." This is applicable to the Royal Arcanum: sec. 147. The Royal Arcanum is not a society incorporated under R.S.O. 1897, ch. 211 (an Act respecting Benevolent, Provident, and other Societies), so as to be entitled to pay the insurance money "to the person or persons entitled under the rules thereof:" ch. 211, sec. 12. The incorporation was in Massachusetts in 1877, under the provisions of the laws there in force, substantially as in ch. 115 and ch. 106 of the Public Statutes, 1881.

Its position is, therefore, in the view of our law, the same as that any other insurance company—e.g., that of the Catholic Order of Foresters in *Gillie v. Young* (1901), 1 O.L.R. 368. That case decides that the rules of the "Order" must give way



to the provisions of the statute so far as they are inconsistent therewith. *Mingeaud v. Packer* (1891), 21 O.R. 267, *S. C.* (1892), 19 A.R. 290, and *Re Harrison* (1900), 31 O.R. 314, may also be looked at.

If, then, the declaration endorsed on the certificate has any validity, the plaintiffs must fail in the issues offered by them.

The grounds of attack upon the endorsement are, it will be seen, two in number: (*a*) that the endorsement was not read to or by Rhoder; and (*b*) that it was ignored and treated as null and void by both Rhoder and the defendant until the death of Rhoder.

As to (*a*), there is not the slightest evidence that Rhoder did not fully understand what he was signing; he has signed his name legibly, and nothing indicates illiteracy in any way; letters, indeed, are produced, written by him, shewing the reverse. The second ground is equally baseless: considerable testimony was given indicating that the policy was transferred rather by way of security for a loan or series of loans than the reverse, but nothing suggests, much less proves, that the transfer "was ignored" or "treated" as "null and void."

The above will dispose of the issues offered in the plaintiffs' claim:—

(1) The infants are not "the designated preferred beneficiaries of their grandfather . . . T. R. Rhoder," for the double reason that they are not "preferred beneficiaries" at all, within the meaning of the statute, T. R. Rhoder not having been their grandfather in a legal sense; and, second, he made a new beneficiary under the provisions of the law in that regard.

(2) "The plaintiffs as next friend to the said infant children" are not "entitled to payment out of Court of the said sum" for several reasons. Assuming (what I by no means concede) that this company can be a next friend at all (R.S.O. 1897, ch. 206, secs. 4, 5, 8; *Nalder v. Hawkins* (1833), 2 My. & K. 243), (*a*) the next friend is not entitled to the infants' money: *Vano v. Canadian Coloured Cotton Mills Co.* (1910), 21 O.L.R. 144; he is brought into Court simply to protect the infants' rights and guarantee the costs: *Dyke v. Stephens* (1885), 30 Ch. D.

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189, at pp. 190, 191; *Smith v. Mason* (1897), 17 P.R. 444; and (b), the infants are not entitled to the money in any case.

(3) The plaintiffs basing their claim to the money specifically "in that the endorsement was not read," etc., and "was ignored," etc.; they fail upon this issue as well.

This by no means disposes of the whole matter. The evidence convinces me that, while the transfer is absolute in form, it was in fact but security for advances already made and to be made. The defendant says that he advanced more than the amount paid into Court; and I think I should not order a reference unless the plaintiffs assume the responsibility of asking for one. The cross-examination of the defendant was not apparently directed to shewing that he had not advanced the amount he claimed. The plaintiffs as administrators would be entitled to the proceeds of the certificate less the amount advanced, etc.

If, within ten days from this date, the plaintiffs apply for an order of reference, such order may go, at their peril as to costs, referring it to the Master at London to determine the amount for which the certificate is security in the hands of the defendant. In that event, I shall reserve to myself the question of costs and further directions until after the Master shall have made his report. If such an order be not taken out by the plaintiffs, I now find all the issues in favour of the defendant, direct the plaintiffs to pay all the costs over which I have control, and order the payment out to the defendant of the amount paid into Court.

[The plaintiffs accepted the reference offered in the judgment; and an order was accordingly made referring it to the Master at London to inquire and report upon the amount for which the insurance certificate and the assignment thereof were security.]

[MIDDLETON, J.]

RE MATTHEW GUY CARRIAGE AND AUTOMOBILE CO.

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*Company—Winding-up—Directors—Misfeasance—Payment for Services as Workmen and Clerks—Ontario Companies Act, sec. 88.*

Section 88 of the Ontario Companies Act, 7 Edw. VII. ch. 34, providing that "no by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting," applies to all cases in which a by-law is necessary for the payment, and covers the remuneration of all officers of the company whose appointment should properly be made by by-law.

*Birney v. Toronto Milk Co.* (1902), 5 O.L.R. 1, explained and followed.

But there is no warrant for extending the principle to a case in which the director has acted as a mere workman or clerk, and has been remunerated at a rate not exceeding the real value of the services rendered, at the ordinary market-price. The section itself does not prohibit the remuneration of a director; and the company cannot retain the benefit of the services rendered by a person employed in a subordinate capacity, who is also a director, without paying a fair price. If the statute renders the contract of hiring invalid, directors who have rendered manual and clerical services have a right to receive a *quantum meruit* for those services; and, if they have not received more, cannot be held guilty of misfeasance.

*Burland v. Earle*, [1902] A.C. 83, 101, followed.

*Re Queen City Plate Glass Co., Eastmure's Case* (1910), 1 O.W.N. 863, *Re Morlock and Cline Limited, Sarvis and Canning's Claims* (1911), 23 O.L.R. 165, and *Benor v. Canadian Mail Order Co.* (1907), 10 O.W.R. 1091, distinguished.

AN appeal by the directors of the company, in liquidation, from an order of the Master in Ordinary, dated the 1st April, 1912, upon the return of a misfeasance summons, whereby he directed the directors severally to repay certain sums received by them from the company in remuneration for services rendered.

May 2. The appeal was heard by MIDDLETON, J., in the Weekly Court at Toronto.

*F. S. Mearns*, for certain directors.

*W. S. McBrayne*, for other directors.

*G. H. Kilmer, K.C.*, for the liquidator.

May 7. MIDDLETON, J.:—After most careful consideration, I am unable to agree with the learned Master. I adhere to the views expressed in *Re Queen City Plate Glass Co., Eastmure's Case* (1910), 1 O.W.N. 863, as to the wide effect to be given to sec. 88 of the Ontario Companies Act, 7 Edw. VII. ch. 34; but I

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think this case entirely different from any of the reported decisions, and falls quite outside the section.

The company was incorporated for the purpose, *inter alia*, of manufacturing automobiles. F. M. Guy was a practical mechanic, and worked at manual labour in the company's shop, receiving a weekly wage of \$15. Daniels also worked, first in the factory and afterwards as a stenographer in the office, receiving the ordinary wage paid to those in like employment. Walter was employed as a painter and varnisher in the factory. Armstrong was the company's bookkeeper. All of these men had been employed by Matthew Guy, the original owner of the business, before it was taken over by the incorporated company; and a formidable contention is made on behalf of these directors that it was part of the original understanding, upon the transfer of the business, that the company should assume the existing contracts with employees; but I prefer not to base my judgment upon this aspect of the case.

The section of the statute provides: "No by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting." There is much to be said in favour of the contention put forward by the appellants, that this section relates to the payment of the president or director for his services rendered in his official capacity, and that it was not intended to deal with payments made to him for services rendered in any other capacity. This seems to have been the view entertained by Mr. Justice Meredith in *Mackenzie v. Maple Mountain Mining Co.* (1910), 20 O.L.R. 615, where he says (p. 621): "The purpose of the enactment is that those who govern the company shall not have it in their power to pay themselves for their services in such government without the shareholders' sanction,"

But I think that the Courts have adopted a wider view of the statute, and that it must be taken to apply to all cases in which a by-law is necessary for the payment, and to cover the remuneration of all officers of the company whose appointment should properly be made by by-law.

*Birney v. Toronto Milk Co.* (1902), 5 O.L.R. 1, is now recognised as conclusive authority for this position. The claim



there was upon an executory contract by which the plaintiff was employed as the manager of the company. The holding is, that the plaintiff could not recover because no by-law for his payment had been passed and no contract was made under the corporate seal. It was pointed out that the appointment of a manager was an entirely different thing from the appointment of mere servants or casual or temporary hiring; the latter contracts not necessitating either a by-law or a contract under seal. It is with reference to such an appointment that Mr. Justice Street used the words relied upon by the liquidator (p. 6): "In my opinion we should hold the section as requiring the sanction of the shareholders as a condition precedent to the validity of every payment voted by directors to any one or more of themselves, whether under the guise of fees for attendance at board meetings or for the performance of any other services for the company. It is not conceivable that the Legislature intended to forbid the directors from voting small sums to themselves for their attendance at board meetings, without obtaining the consent of the shareholders, and at the same time to allow them to vote large sums to themselves for doing other work, without reference at all to the shareholders. The interpretation contended for by the plaintiff would in fact render the section nugatory, for nothing would be easier than to evade it. I think the section should be given a broad and wholesome interpretation, and that it should be held wide enough to prevent a president and board of directors from voting to themselves or to any one or more of themselves any remuneration whatever for any services rendered to the company without the authority of a general meeting of the shareholders."

I have neither the right nor the inclination to narrow this statement of the law, when rightly understood; but, bearing in mind that it was spoken of an employment for which a by-law is necessary, and that the section itself does not prohibit the remuneration of a director, but merely renders invalid any by-law, I do not think that there is any warrant for extending the principle to cases in which the director has acted as a mere workman or clerk and has been remunerated at a rate not exceeding the real value of the services rendered, at the ordinary market-price.

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I think that the principle applicable is analogous to that applied to *ultra vires* contracts, where the company has received the benefit. It cannot retain the benefit without paying a fair price. If the effect of the statute is somewhat larger than I have indicated, and renders invalid the contract of hiring, then the directors have, as servants of the company, in the discharge of the manual and clerical services which they have respectively rendered to the company, a right to receive a *quantum meruit* for those services. It is not suggested that they have received more than this. Therefore, they have not been guilty of misfeasance.

I do not find anything in the decided cases opposed to this view. In *Re Queen City Plate Glass Co., Eastmure's Case*, *supra*, repayment was ordered of salary received by Eastmure as president; and I refused to recognise any claim based upon a *quantum meruit*, because, when services have been rendered by a director and accepted, no promise to pay can be inferred; his services, in the absence of the by-law, being deemed to be gratuitous. But here the whole circumstances shew that the wages were paid as remuneration for labour in the factory and office, and indicate that it was not intended that the labour should be gratuitously rendered.

In *Burland v. Earle*, [1902] A.C. 83, at p. 101, this view appears to receive the sanction of the Privy Council. J. H. Burland had been secretary. When he became a director, and was appointed vice-president, he continued to do the same class of work that he had done as secretary. "He was allowed by the directors to continue to draw his former salary without any observation until the present action; and their Lordships think that the inference may fairly be drawn, from all the circumstances of the case, that he was intended to retain his salary, although there was a shifting of the offices."

So here, I think the true intendment was, that, upon the taking over of these carriage works by the incorporated company, the former employees were intended to continue to render similar services and to draw the same remuneration as they had theretofore received. I do not put this as being part of the bar-

gain, but as being the result of their continuation in the employment.

*Re Morlock and Cline Limited, Sarvis and Canning's Claims* (1911), 23 O.L.R. 165, is very close to this case; and, as I had some doubt whether it might not be regarded as determining the point in a way opposed to my present view, I availed myself of the privilege of discussing it, and *Benor v. Canadian Mail Order Co.* (1907), 10 O.W.R. 1091, with my brother Riddell; and he tells me that, in his view, these cases are not opposed to the opinion which I have formed. In the *Benor* case, a by-law was clearly necessary; and in the *Morlock* case, the distinction between cases in which a by-law is necessary and cases of the employment of a mere servant was not suggested.

For these reasons, I think the appeal succeeds, and should be allowed, with costs here and below.

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[DIVISIONAL COURT.]

RE REX v. HAMLINK.

*Prohibition—County Court Judge—Jurisdiction—Convictions under Inspection and Sale Act, R.S.C. 1906, ch. 85, sec. 321—Appeal to County Court under sec. 335—Time for Hearing and Decision—Extension—Powers of Judge—Costs of Appeal—Criminal Code, R.S.C. 1906, ch. 146, sec. 751—Taxation by Clerk of County Court—Adoption by Judge—Amendment of Order—Sessions Practice—Discretion.*

On the 11th January, 1910, the defendant was convicted by a Police Magistrate of three offences against sec. 321 of the Inspection and Sale Act, R.S.C. 1906, ch. 85. On the 17th January, the defendant appealed, under sec. 335 of the Act, to a County Court; the appeal came before the Judge of the County Court on the 7th February; and, upon that day, the Judge made an order extending for ten days the time for hearing the appeal. On the 17th February, the hearing was enlarged to the 17th March; again, to the 22nd March; and upon the 22nd March and 23rd March the appeal was heard. After argument, judgment was reserved; and on the 30th April judgment was given and an order made dismissing the appeal and affirming the convictions, "with costs to be paid by the appellant to the respondent; such costs to be taxed according to the scale of costs taxable in this Court, and such costs to be taxed by the clerk of this Court." The respondent's costs were taxed by the clerk on the 16th June, against the defendant's protest. The defendant moved before a Judge of the High Court for an order prohibiting the respondent and the County Court Judge and clerk from taking any further proceedings, upon the grounds: (1) that the Judge, when he made the order, was *functus officio*; (2) that the decision was not given within thirty days from the date of conviction, nor was the time for hearing and decision extended, as required by sub-sec. 2 of sec. 335; (3) that the Judge did not find the amount of costs, but directed the costs to be taxed by the clerk; (4) that the Judge, having made his final order without fixing the costs, was *functus officio*; (5) that the clerk had no jurisdiction to tax the costs.

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The motion for prohibition came before SUTHERLAND, J., who ordered that it should be enlarged for ten days, to enable the respondent to apply to the County Court Judge to amend his order by himself fixing the amount of costs, and dismissed in the event of that course being taken:—

*Held*, affirming the order of SUTHERLAND, J., that the County Court Judge was not *functus officio*; and that the case was not one for prohibition.

History of the legislation upon the subject of the costs of appeals from convictions and review of the authorities.

*Per RIDDELL, J.*:—The order extending the time to ten days after the 7th February, that is, to the 17th February, more than thirty days after the conviction, made the time wholly at large and wholly in the discretion of the Judge. The extension of the time for hearing the appeal was an extension of the time for decision as well; and the order of the 7th February was an order "extending the time for hearing and decision," under sec. 335 (2). As there is no time-limit or limit to any particular sittings, the Court is not *functus officio* until everything is done which should be done.

The very most that could be said was, that the Judge had not stamped the amount of costs with his approval, and caused that amount to be inserted in the order. Prohibition is not *ex debito justitiæ*—it is an extreme measure; and it would be absurd to prohibit the Judge from acting upon an order which he could make right with a few strokes of his pen.

Distinction between cases arising out of appeals to the Sessions and this appeal to a County Court, pointed out.

*Semble*, that the word "costs," as used in sec. 751 of the Criminal Code, R.S.C. 1906, ch. 146, providing that "the Court to which such appeal is made shall . . . make such order therein, with or without costs to either party, including costs of the Court below, as seems meet to the Court," would mean, in the case of an appeal to a County Court, costs taxable between party and party in the County Court.

At all events, there was such doubt in fact and law whether the inferior Court was exceeding its jurisdiction or acting without jurisdiction, that the High Court should exercise its discretion to refuse a prohibition.

MOTION by the defendant for an order prohibiting the respondents from enforcing certain orders.

October 7, 1910. The motion was heard by SUTHERLAND, J., in Chambers.

*W. Proudfoot*, K.C., for the applicant.

*Frank McCarthy*, for the respondent Baker.

November 3, 1910. SUTHERLAND, J.:—This is an application on behalf of one Derrick F. Hamlink, the appellant in three similar proceedings, "for an order that the respondents, The King, Merrit R. Baker, Bernard Lewis Doyle, Esquire, Judge of the County Court of the County of Huron, and Daniel McDonald, clerk of the said Court, be" in each case "prohibited from taking any further proceedings in the said actions, or upon three certain orders made therein, bearing date the 30th day of April, 1910, and intituled 'In the County Court of the County of Huron,' dismissing the appeals of the said Hamlink to the County Court



from three convictions" made "on the 11th day of January, 1910, by John Butler, Police Magistrate for the Town of Goderich, under the Inspection and Sale Act, R.S.C. 1906, ch. 85, sec. 321, whereby the said Hamlink was found guilty" in each case "of a violation of said Act, and ordered to pay the sum of \$10," in each case, by way of fine, and also in each case a specific sum for costs, "or upon a certificate of taxation given under each of said orders by the said clerk," and "to set aside the said orders and certificates and all proceedings that have been or may be taken under the same."

An information was laid in each case before the said Police Magistrate by Meritt R. Baker, a Dominion Fruit Inspector, on the 3rd day of December, 1909, and the charges were tried before the said Magistrate and convictions made in each case upon the 11th January, 1910.

An appeal to the County Court of the County of Huron was taken from the said convictions on the 17th day of January, 1910, pursuant to sec. 355 of the said Act, the sum of \$250 being deposited by the appellant with the said Police Magistrate on lodging his appeal. The matters apparently first came before B. L. Doyle, Esquire, Senior Judge of the said County Court, on the appeals, on the 7th day of February, 1910, whereupon he endorsed and signed on each of the notices of appeal the following memorandum: "I hereby extend the time for hearing the appeal herein for ten days from this date. Dated 7th of February, 1910. B. L. Doyle, J. C. C. Huron."

On the 17th February, 1910, the matter apparently again came before him, and he endorsed a further extension of time to the 17th March, 1910, at one p.m.

Before such last-mentioned extension had expired, apparently, he, on the 10th day of March, 1910, made another extension to the 22nd March, and fixed that date at one p.m. for the hearing of the appeals.

The appeals were heard accordingly on the 22nd and 23rd days of March, 1910, and judgment reserved.

It is said on behalf of the applicant on this motion that at the conclusion of the hearing no further enlargement was made by the said Judge.

The respondent, on the motion, filed an affidavit of his solicitor, in which it is stated that on the 23rd March the argument of the

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case was postponed until the 28th March and again postponed until the 29th March, when the appeals were argued and judgment reserved; and, in the same affidavit, what purports to be a copy of a memorandum taken from the book kept by the clerk of the said County Court, under date the 23rd March, 1910, reads as follows: "Trial concludes at 11.15 a.m.; argument postponed until the 28th March, 1910, at 11 a.m."

In each case a written judgment in the following terms was later handed out by the said Judge: "I affirm the conviction herein, and order that the sum thereby adjudged to be paid, together with the costs of the said conviction and the costs of this appeal, shall be paid out of the money deposited by the said appellant on lodging his appeal with the Police Magistrate for the Town of Goderich, and that the residue of the said deposit, if any, shall be paid to the said appellant. Dated at Goderich this 30th of April, 1910."

After the disposition of the appeals as aforesaid by the said Judge, the respondent filed and served copies of his bill of costs in each of the cases, and took out an appointment to tax the same before the clerk of the said County Court, and they were taxed on the 16th day of June, 1910, at \$104.50, \$29.95, and \$27.45 respectively.

On the 9th day of June, 1910, formal orders dismissing the said appeals had been settled by the said Judge, in the presence of counsel for both parties; and the said orders, when issued, were dated the 30th day of April, 1910, and were filed in the office of the said clerk on the 16th June, 1910.

Each of the orders contains the following clauses:—

"(2) This Court doth order that the said appeal be and the same is hereby dismissed, and the said conviction affirmed, with costs to be paid by the appellant to the respondent; such costs to be taxed according to the scale of costs taxable in this Court, and such costs to be taxed by the clerk of this Court.

"(3) And this Court doth further order that such costs, when so taxed, be paid by the appellant to the clerk of this Court to be paid over by the said clerk to the respondent.

"(4) And this Court doth further order that such costs be paid by the appellant within one week of the day when the same are so taxed as aforesaid."

An affidavit of the solicitor for the appellant herein, sworn on the 20th day of June, 1910, is filed upon this motion, and says in part:—

“(6) The time for hearing the said appeals was enlarged by the Judge of the County Court from time to time until the trial, which took place on the 22nd and 23rd days of February, 1910. The learned trial Judge, on the completion of the trial, reserved his judgment. The said Court was not, however, adjourned; nothing was done in connection with said appeals by way of rendering a decision therein until the 30th day of April last, when the Judge of the County Court handed out a finding dismissing each of the appeals with costs.”

“(7) The respondent Merritt R. Baker then caused a final order to be taken out, which order bears date the 30th day of April, 1910, but was not signed by the trial Judge until within the last few days.

“(8) Upon the settling of the said orders dismissing the three appeals, I took objection to the order, on the ground that the Judge should fix the amount of costs that should be paid by the appellant, if any.

“(9) The respondent, after the said order was issued, proceeded to make up his bills of costs in each of the three appeals, and had them taxed, as directed by the said orders, by the clerk of the County Court of the County of Huron, in accordance with the County Court tariff. I appeared on said taxation, and objected to the clerk of the County Court proceeding, and said objection was noted. The said bills were taxed in part and left in order that the respondent might apply to the trial Judge for fiats and counsel fees.

“(10) Notice of application for fiats was served, and I attended upon said application, and objected to the learned Judge fixing any counsel fee, as he would do in an ordinary County Court case, and took the objection that he had no jurisdiction, as he had already signed the order, and that in my opinion, even before he signed the order, he was *functus officio*. The learned Judge expressed himself as of the opinion that there was considerable force in my contention, but was of the opinion that he had jurisdiction to amend his order of the 30th of April, 1910, revise the taxation made by the clerk of the County Court, and adopt and embody

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it in his order dismissing the appeal. The counsel for the respondent appeared to agree with that contention, and, on the request of the Judge, handed over to him the several bills for the purpose of allowing him to revise same. The learned Judge then proceeded to revise said bills, and, on his announcing what he proposed to do with them, the counsel for the respondent stated that he had not come prepared to argue the question of the right of the appellant to object to said order or to the terms of it, and asked that the matter stand to permit of it being further argued before His Honour.

“(11) The counsel for the respondent, immediately on leaving the chambers of the trial Judge, took the bills to the clerk of the County Court, and insisted upon him closing the taxation and taxing such counsel fee as he could without fiat.

“(12) The Judge of the County Court, when the matter was first before him, and after he had given an expression of what he would do with the bills, was informed by counsel for the respondent that he had an order signed by the Judge, and that they did not purpose going before him again to further argue the matter or ask for any further directions with the costs, and the trial Judge then stated that it appeared to him that the counsel for the respondent had simply given him the bills to find out what his attitude would be, and, when he found that it was opposed to the contention of the respondent, that he had wished to withdraw it.

“(13) The clerk of the County Court, at the request of the respondent, as I am advised and believe, closed the taxation and issued his certificate; and I am of the opinion that, unless the respondent and the said County Court clerk be restrained by the order of this Court, execution will be issued out of the said Court and distress made of the goods of the appellant.”

A further affidavit was filed by the respondent on these appeals, made by a solicitor who acted as agent for the respondent's solicitor on the taxation of the said bills, and which contains the following statement: “Said taxations were completed by the clerk of the said Court with the exception of fixing the counsel fees of the respondent's counsel at the trial of the appeals; and, in accordance with the practice of the Court, I served Mr. Blair (the appellant's solicitor) with a notice to attend before His Honour Judge Doyle for the purpose of getting fiats for such



counsel fees, and upon the return of such notice Mr. Blair attended and objected to the Judge granting fiats, contending that the learned Judge should have fixed the costs in the orders which he made dismissing the appeals; and the learned Judge said that, if such was the case, he would amend the orders and fix the costs; but I contended that I was not there for that purpose, but only on the application for the fiats; and, as the orders stood until the appellant moved to set them aside or vary them, my instructions were to abide by them; and, when the learned Judge informed me that he would not fix a greater counsel fee than \$10, I informed him that there was no necessity for obtaining his fiat, as the clerk of the County Court could tax a counsel fee of that amount himself; and I declined to have the learned Judge retax the bills unless the appellant should, in the first place, either move to set aside or amend the order already made; and I then immediately proceeded to the clerk's office, and, in the presence of Mr. Blair, closed the taxation of the costs and obtained a certificate from the clerk of the result of the taxation and served the same upon Mr. Blair."

Upon this application, I am asked to grant prohibition on several grounds. The informations were laid under the Act respecting the Inspection and Sale of Certain Staple Commodities, R.S.C. 1906, ch. 85, sec. 321, sub-secs. 2 and 3, for alleged violations in reference to the quality of the apples packed. Section 335 of said Act is as follows:—

"No appeal shall lie from a conviction under this Part except to a Superior, County, Circuit or District Court, or the Court of the Sessions of the Peace, having jurisdiction where the conviction was had; and such appeal shall be brought, notice of appeal in writing given, recognizance entered into or deposit made, within ten days after the date of conviction.

"2. The trial on any such appeal shall be heard, had, adjudicated upon and decided, without the intervention of a jury, at such time and place as the Court or Judge hearing the trial appoints, and within thirty days from the date of conviction, unless the said Court or Judge extends the time for hearing and decision beyond such thirty days.

"3. In all respects not provided for in this Part, the procedure

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under Part XV. of the Criminal Code shall, so far as applicable, apply to all prosecutions brought under this Part."

There is an amendment to this Act in 1908, but it deals only with the question of penalties, and is not of importance in connection with these appeals.

The Criminal Code, R.S.C. 1906, ch. 146, Part XV., sec. 751, prescribes that "the Court to which such appeal is made shall thereupon hear and determine the matter of appeal and make such order therein, with or without costs to either party, including costs of the Court below, as seems meet to the Court, and, in case of the dismissal of an appeal by the defendant and the affirmance of the conviction or order, shall order and adjudge the appellant to be punished according to the conviction or to pay the amount adjudged by the order, and to pay such costs as are awarded, and shall, if necessary, issue process for enforcing the judgment of the Court.

"2. In any case where a deposit was made on appeal previously to the twentieth day of July in the year of our Lord one thousand nine hundred and five, if the conviction or order is affirmed, the Court may order that the sum thereby adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal, shall be paid out of the money deposited, and that the residue, if any, shall be repaid to the appellant; and, if the conviction or order is quashed, the Court shall order the money to be repaid to the appellant.

"3. The Court to which such appeal is made shall have power, if necessary, from time to time, by order endorsed on the conviction or order, to adjourn the hearing of the appeal from one sittings to another, or others, of the said Court."

Section 752: "When an appeal against any summary conviction or order had been lodged in due form, and in compliance with the requirements of this Part, the Court appealed to shall try, and shall be the absolute judge, as well of the facts as of the law, in respect to such conviction or order."

Section 758: "If upon any appeal the Court trying the appeal orders either party to pay costs, the order shall direct the costs to be paid to the clerk of the peace or other proper officer of the Court, to be paid over by him to the person entitled to the same, and shall state within what time the costs shall be paid."

The grounds on which the motion is based are as follows:—

“(1) The learned Judge, at the time he made said orders, was *functus officio*.

“(2) The special Act under which said appeals were had, provided that the appeal should be ‘heard, had, adjudicated upon and decided . . . within thirty days from the date of conviction, unless the said Court or Judge extends the time for hearing and decision beyond such thirty days.’ Said decision was not given within thirty days, nor was the time extended.”

It seems to me that, if called upon to do so, and if I had the power to do so, I would hold that the learned County Court Judge had sufficiently extended the time for the hearing and decision of the appeals, and was still seized of the matter at the time he gave judgment.

The other grounds are:—

“(3) The learned Judge of the County Court did not find, as he is required to do, the amount of costs, if any, that the appellant should pay, nor did he, in what purported to be his final order dismissing each of the said appeals, state what was the amount of the costs, if any, which the appellant should pay; but directed the same to be taxed by the clerk of the County Court of the County of Huron.

“(4) The said learned Judge, having made his final order without fixing said costs, is now *functus officio*, and has no power to set aside, vary, or substitute another order for the one of the 30th April, 1910.

“(5) The clerk of the County Court had no jurisdiction to tax the costs of said appeals under said orders.”

It seems to me also that, if called upon to do so, and if I had the power to do so, I would hold that it was the duty of the learned County Court Judge himself to fix the amount of the costs when disposing finally of the appeals, and that he was not warranted in delegating the taxation thereof to the clerk of the County Court, nor could the latter finally tax the same and fix the amount thereof. The County Court Judge might have availed himself of the assistance of the clerk in arriving at the proper amount of costs to be allowed, but he himself should pass judgment upon and fix the said amounts: *Regina v. McIntosh* (1897), 28 O.R. 603.

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Perhaps it is not too late for him to do this, upon a reconsideration and amendment of the orders.

Now, prohibition is a remedy that should be sparingly applied, and only in a plain case: *Re Cummings and County of Carleton* (1894), 25 O.R. 607, 26 O.R. 1. The appeal in this case was decided on the merits without affecting the general proposition as to prohibition being an extreme measure. See also *In re Grass v. Allan* (1866), 26 U.C.R. 123.

In the matters in question, the judgment of the County Court Judge is under sec. 752 quoted above, and is a final judgment.

I assume that on the merits the convictions are right and should stand.

Apart from the question of the power of the Judge having been exhausted, in so far as the appeals were concerned, at the time he gave judgment, on the 30th April, this matter is mainly one as to costs.

I am not clear that the remedy asked for, namely, prohibition, is one that should be applied, even if I had the power in this particular case to grant that remedy.

I think, on the whole, the best course to take is to enlarge the matter for ten days, during which the County Court Judge may be applied to, if the respondent desires, to amend the orders in question, by himself fixing the amount of costs which he thinks should be allowed. If that is done, the motion will be dismissed without costs, unless either party desire to speak to the question of costs, in which case they may have leave to do so.

The defendant appealed from the order of SUTHERLAND, J.

April 16, 1912. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

*W. Proudfoot*, K.C., for the defendant. The learned Judge, at the time he made the order appealed from, was *functus officio*. The special Act under which these appeals were had, provided that the appeal should be "heard, had, adjudicated upon and decided . . . within thirty days from the date of conviction, unless the said Court or Judge extends the time for hearing and decision beyond such thirty days." The decision here was not given within thirty days, nor was the time extended: *Re Rowland and McCallum* (1910), 22 O.L.R. 418; *In re Township of Notta-*



*wasaga and County of Simcoe* (1902), 4 O.L.R. 1; *Re Bothwell v. Burnside* (1900), 31 O.R. 695; *Midland R.W. Co. v. Guardians of Edmonton Union*, [1895] 1 Q.B. 357; *Regina v. McIntosh*, 28 O.R. 603; *In re Rush and Village of Bobcaygeon* (1879), 44 U.C.R. 199; *In re McCumber and Doyle* (1867), 26 U.C.R. 516; *The Queen v. Murray* (1867), 27 U.C.R. 134; Seager's Magistrates' Manual, 2nd ed., pp. 75, 78; *Re Chapman and City of London* (1890), 19 O.R. 33; *Farquharson v. Morgan*, [1894] 1 Q.B. 552. The learned Judge of the County Court did not find, as he is required to do, the amount of costs, if any, that the appellant should pay, nor did he, in what purported to be his final order dismissing each of the appeals, state the amount of the costs which the appellant should pay, but directed the costs to be taxed by the clerk of the County Court. Having made his final order without fixing the costs, the Judge is now *functus officio*, and has no power to set aside, vary, or substitute another order for, that of the 30th April, 1910. The clerk of the County Court had no jurisdiction to tax the costs of the appeals under the orders.

*M. G. Cameron*, K.C., for the respondent. The Judge had jurisdiction when he made the orders of the 30th April, 1910. He may have made a mistake in not fixing the amount of the costs, but that is not a subject for prohibition. When a Judge has jurisdiction, the transgression of a rule of practice forms no ground for prohibition: *Fee v. McIlhargey* (1882), 9 P.R. 329; *Martin v. Mackonochie* (1878), 3 Q.B.D. 730; *Ex p. Story* (1852), 12 C.B. 767, at p. 777.

*Proudfoot*, in reply.

May 10. BRITTON, J.:—All the facts involved in these three cases are fully set out in the judgment of Sutherland, J.

There is not any further appeal on the merits, and we must assume that the defendant was properly convicted. The convictions were upon informations laid under R.S.C. 1906, ch. 85; and the defendant appealed under sec. 335 of the same Act. The appeals were properly lodged in due form, and were to the County Court of the County of Huron. The convictions are dated the 11th January, 1910. In case of appeal the Act requires that it be taken within ten days, and the trial of the appeal must be within thirty days from the date of conviction "unless the said

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Court or Judge extends the time for hearing and decision beyond such thirty days." An extension of time for hearing necessarily involves an extension of time for decision. Where there is any conflict or discrepancy as to what actually took place in formally extending the time, or in fact as to the action of a Judge or Court officer in any matter of routine, the presumption that all was done rightly should prevail. Where, as in this case, the Judge had the power to extend the time, and acted as if such extension was actually made, it would require a very strong and clear case to warrant prohibition because of the omission formally to announce or make a memorandum in writing of an extension of time for doing what afterwards was done. As to this objection—and also as to the objection that the Judge did not himself fix the amount of costs—I have, to say the least of it, grave doubts as to the applicability of the cases cited.

I have given every consideration in my power to the very full and complete arguments addressed to the Court by counsel. I have read the cases cited—and I have carefully considered the judgment of my brother Sutherland and his reasons for refusing the motion. The conclusion reached by me is, that it is not a proper case for prohibition.

As I have, since going over this case, had an opportunity of reading the reasons for decision of my brother Riddell—and as I agree that the appeal should be dismissed—I need not attempt to give further reasons. I may add this, that it should be only where there is absolutely no doubt, that a party litigant, invoking the aid of the Court to get rid of a conviction, should, after going a certain length and being likely to fail, stop short and deny the right of the Court to go further.

The appeal should be dismissed with costs.

RIDDELL, J.:—An appeal from the decision of my brother Sutherland, the defendant contending that he is entitled to prohibition forthwith. Sufficient reason has been shewn for the delay in taking the appeal. The facts are set out accurately and in sufficient detail by the learned Judge. I mention the important dates, etc.

The defendant was on the 11th January, 1910, convicted before the Police Magistrate at Goderich, under sec. 321 of R.S.C. 1906, ch. 85; an appeal was taken (17th January), under sec. 335 of the

Act, to the County Court of the County of Huron; the matter came on before the Judge of that Court on the 7th February, and that learned Judge, upon that day, made the following order: "I hereby extend the time for hearing the appeal herein for ten days from this date." On the 17th February, the hearing was enlarged to the 17th March; then on the 10th March, to the 22nd March; and upon the 22nd and 23rd March the appeal was heard. (There were in reality three convictions, appeals, etc., but I treat them all as though there were only one.)

It is said that an enlargement was made for argument till the 28th March, and then till the 29th March; but this is denied. A note appears in the clerk's book of the enlargement till the 28th March. After argument—it is not pretended that full opportunity for argument was not afforded and taken advantage of—judgment was reserved, and on the 30th April the learned Judge handed out his judgment: "I affirm the conviction . . . and order that the sum thereby adjudged to be paid, together with the costs of the said conviction and the costs of this appeal, shall be paid out of the money deposited by the said appellant," etc., etc.

The informant thereupon filed his bills of costs, which, on the 16th June, were taxed by the clerk of the County Court, over the protest of the defendant. On the 9th June, formal orders were taken out, dated the 30th April, and copies filed in the office of the clerk on the 16th June; these were to the following effect:—

"2. This Court doth order that the said appeal be and the same is hereby dismissed, and the said conviction affirmed, with costs to be paid by the appellant to the respondent; such costs to be taxed according to the scale of costs taxable in this Court, and such costs to be taxed by the clerk of this Court.

"3. And this Court doth further order that such costs when so taxed be paid by the appellant to the clerk of this Court to be paid over by the said clerk to the respondent.

"4. And this Court doth further order that such costs be paid by the appellant within one week of the day upon which the same are so taxed as aforesaid."

A motion was made "for an order that the respondents, the King, Merrit R. Baker, Bernard Lewis Doyle, Esquire, Judge of the County Court of the County of Huron, and Daniel McDonald, clerk of the said Court, be prohibited from taking any further

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proceedings in the said actions, or upon three certain orders made therein, bearing date the 30th day of April, 1910, and intituled 'In the County Court of the County of Huron,' . . . on the following amongst other grounds: (1) The . . . Judge . . . was *functus officio*; (2) . . . the . . . decision was not given within thirty days, nor was the time extended; (3) the . . . Judge . . . did not find . . . the amount of costs . . . ; (4) the Judge, having made his final order . . . is now *functus officio* . . . ; (5) the clerk . . . had no jurisdiction to tax the costs . . . ."

Passing over the novelty of asking prohibition against the King, the story continues: the motion came on before my brother Sutherland, who, for reasons given in his judgment, made the following order:—

"1. It is ordered that this motion be enlarged for ten days, during which time the Judge of the County Court may be applied to, if the respondent desires, to amend the orders in question by himself fixing the amount of costs which he thinks should be allowed.

"2. It is further ordered that, if said course is taken, this motion be dismissed without costs, unless either party desires to speak to the question of costs, in which case they may have liberty to do so."

Apparently the County Court Judge was applied to, although with what result (or even that he was applied to at all), we are not informed.

The defendant appeals from this order, and presses much the same grounds as were urged before Mr. Justice Sutherland.

Very many cases were cited, either by name or by reference, and it becomes necessary to see how the decided cases affect the present, if at all.

In considering and applying these many cases referred to expressly or by implication, regard must be had to the history of the legislation.

While, at least in some cases, the appeal to the Sessions from convictions by persons having jurisdiction similar to that of Justices of the Peace, goes back to the time of the Restoration, 12 Car. II. ch. 2, and from convictions by Justices of the Peace to 22 Car. II., no power was given to award costs until 1697:



8 & 9 Wm. III. ch. 30, by sec. 3, allows and directs the Justices in the Sessions, "at the same Quarter Sessions," to "award and order to the party, etc. . . . such costs and charges in the law as by the said Justices in their discretion shall be thought most reasonable and just . . ." As this applied only to certain named appeals, a new provision was made in 1849, by 12 & 13 Vict. (Imp.) ch. 45, sec. 5: "That upon any appeal to any Court of General or Quarter Sessions of the Peace the Court before whom the same shall be brought may, if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs and charges as may to such Court appear just and reasonable . . ." It was under this statute that most of the English cases were decided; and they laid down (1) that the same Court which decided the case should fix the costs. As Lord Halsbury says in *Midland R.W. Co. v. Guardians of Edmonton Union*, [1895] 1 Q.B. 357, at p. 362, "the Legislature knew very well that, whatever may be the identity of the court as an abstraction, it occasionally consists of different persons, and they [*i.e.*, the Legislature] have accordingly provided that the power to order costs shall be exercised by the Court before which the appeal is tried." And (2) the Court must fix the costs and not delegate this judicial duty to a clerk.

As is shewn in *Re Bothwell v. Burnside*, 31 O.R. 695, at p. 702, it soon became the practice for the clerk to tax the costs, and for the Court to adopt the amount taxed by him, and include it in their order; but this had to be done during the same sessions. It then became the practice for parties to consent to the taxation out of sessions and the insertion then of the amount in the order; in case of such consent, the Courts would not permit the fact that the taxation was out of sessions to be taken advantage of, and the slightest evidence of such consent was considered enough, as the practice was so very common. I do not follow out the Imperial legislation: the practice is substantially founded on Baines' Act, 12 & 13 Vict. ch. 45, already referred to: and the curious may find all the legislation mentioned in Paley on Summary Convictions and Scholefield & Hill's Appeals from Justices.

In Upper Canada, the first Act of any significance is (1850) 13 & 14 Vict. ch. 54, which, by sec. 1, gave an appeal to the "next Court of General Quarter Sessions of the Peace . . . and the

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Court *at such sessions* shall hear and determine the matter of such appeal, and shall make such order therein, with or without costs to either party, as to the Court shall seem meet . . . :” the appeal was tried by a jury: sec. 2. A change was made in 1859, at the consolidation, but merely verbal—the appeal is to the “first Quarter Sessions of the Peace”—the rest is as before: C.S.U.C. 1859, ch. 114, sec. 1: the trial still is by jury, if either party desires. It was under this legislation, *i.e.*, where the Court must proceed “at such sessions,” that some of our cases were decided: *In re McCumber and Doyle*, 26 U.C.R. 516; *The Queen v. Murray*, 27 U.C.R. 134.

Then came the Act to assimilate the practice of the Provinces of Canada (1869), 32 & 33 Vict. (D.) ch. 31. This, by sec. 65, provided for an appeal to the “next Court of General or Quarter Sessions,” and provided that “the said Court shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the Court seems meet . . . .” The trial continues to be by jury, if either party so desires: sec. 66.

*In re Rush and Village of Bobcaygeon*, 44 U.C.R. 199, was decided under this statute by Cameron, J. (afterwards Sir Matthew Cameron, C.J.): “It seems clear . . . that the Court of Quarter Sessions at which the appeal is heard must determine . . . whether costs are to be paid: secondly, what costs, that is, costs of the Court below, or magistrate’s Court, or costs of the appeal, or both, and when such costs should be paid. The clerk of the peace may tax the costs at any time during the then sitting of the Sessions, or at any adjourned sitting thereof; but it would seem clear, upon the authorities, the Court must adopt his taxation, and that an order made without such adoption would be invalid.”

Then came, after certain legislation, the Code of 1892, 55 & 56 Vict. ch. 29, consolidating 51 Vict. ch. 45, sec. 8, and 53 Vict. ch. 37, sec. 24. This, in sec. 880, provides for an appeal, in practically the same words as are found in the present Code, secs. 750, 751.

It was under the Code of 1892 that *Re Bothwell v. Burnside*, 31 O.R. 695, came on for decision. There the appeal was to the Court of General Sessions of the Peace for the County of Kent sitting on the 13th June, 1899, adjourned to the 29th June, judg-

ment reserved until the 4th July, 1899—the sittings of the Court being then adjourned until the 10th July, and ending that day. On the 4th July, 1899, the Chairman gave judgment: “Appeal in this case dismissed with costs to be taxed by the clerk of the peace within five days.” Taxation of costs began on the 8th July, and was closed on the 13th July; at the next sittings, on the 12th December, an order was made for a warrant of distress. An order *nisi* was obtained calling upon the chairman, the clerk of the peace and the informant, to shew cause why any and every order issued and direction made by the Chairman in connection with the matter of the appeal should not be quashed. No formal order had been drawn up and made in pursuance of the minute. The Court (Armour, C.J., and Street, J.) held that a formal order should have been drawn up “in compliance with the Criminal Code, sec. 880 (e), and sec. 897, and which should have contained the amount of the costs awarded.” And, accordingly, the certificate of the clerk of the amount of the costs and that they had not been paid, and the order of the Sessions made in December, were quashed. But the Court proceeded to say that, while the costs under sec. 884 (now sec. 755) would have to be taxed and included in the order of the Court during the sittings of the Court, unless taxed out of Sessions by consent, there is no such restriction of the power of the Court under sec. 880 (e), (f), now secs. 750, 751, to the same sittings of the Court for which notice of appeal has been given. The Court of General Sessions being a continuing Court, there is “no reason why at the next sittings of the Court of General Sessions of the Peace for the County of Kent the formal order should not be drawn up and made in pursuance of the said minute, and the costs included therein *nunc pro tunc* if necessary.” p. 704.

It will be seen that the decision of Mr. Justice Rose in *Regina v. McIntosh*, 28 O.R. 603, is upon the same statute, as that learned Judge considered that the provisions of secs. 879, 880, must be read into the Act under which the prosecution was brought: see p. 606 *ad init.* He then says: “It seems clear that the costs to be awarded are to be such as appear right in the discretion of the Court. Such sum might be awarded in gross. The discretion of the Court fixes the amount. No reference is made to any tariff, and as none is provided, one may be adopted by the Judge to aid

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his discretion. . . . The Judge fixes the amount which seems to him to be reasonable. He may think because proceedings were before him as a Judge of the County Court that the tariff of the County Court will be a reasonable guide. . . . The clerk had no power to tax the costs, although the Judge might have had a taxation by the clerk for the purpose of assisting him in fixing the amount. Whatever sum the clerk might have certified to him as allowable under any tariff, the Judge might adopt as reasonable or he might not . . . The amount to be named is to be determined in the discretion of the Judge . . . and I have no jurisdiction vested in me to review his discretion . . ."

Giving these decisions their full force, and assuming that they apply to the present, what is the result?

The appeal is to the County Court, under sec. 335 of R.S.C. 1906, ch. 85: this section provides: "2. The trial on any such appeal shall be heard, had, adjudicated upon and decided, without the intervention of a jury, at such time and place as the Court or Judge hearing the trial appoints, and within thirty days from the date of conviction, unless the said Court or Judge extends the time for hearing and decision beyond such thirty days."

The perfectly general "time" for trial is not limited at all, if the Judge does extend the time beyond "such thirty days."

Even supposing the very stringent rule laid down in *Power v. Griffin* (1902), 33 S.C.R. 39, to apply, and the power to extend exercisable only once; and supposing the large powers given in the Code, sec. 751 (3), cannot be exercised by the Judge here, I am of opinion that the order extending the time to ten days after the 7th February, that is, to the 17th February, more than thirty days after the conviction, made the time wholly at large and wholly in the discretion of the Judge. The extension of the time for hearing the appeal necessarily was an extension of the time for decision as well—and consequently the order of the 7th February was an order "extending the time for hearing and decision," under sec. 335 (2).

The Judge could sit at any time to hear, adjudicate upon, and decide anything and everything the law called upon him to hear, adjudicate upon, and decide.

That he had the right to have the clerk tax the costs for his own information is undoubted—if the clerk taxed when the Court



was not sitting, this was at most an irregularity (if even that)—the Court could sit again, if necessary, and have the form of taxation gone through, and insert the amount in the order. The Court is not *functus officio* until everything is done which should be done—as there is no time-limit or limit to any particular sittings. The very most that can be said is, that the Judge has not stamped with his approval the amount, and caused that amount to be inserted in the order.

Prohibition is not *ex debito justitiæ*—it is an extreme measure: *In re Birch* (1855), 15 C.B. 743; *Re Cummings and County of Carleton*, 25 O.R. 607, 26 O.R. 1; and is not granted in case of a mere illegality or irregularity not going to the jurisdiction: *Regina v. Mayor of London* (1893), 69 L.T.R. 721; or where the judicial officer having jurisdiction goes about it in an irregular manner: *Regina v. Justices of Kent* (1889), 24 Q.B.D. 181.

It would, in my view, be absurd to direct prohibition to the County Court Judge, forbidding him to act upon an order which he can make right by a few strokes of his pen.

This consideration is, I think, sufficient to dispose of the appeal—my brother Sutherland's order was practically "Get the Judge to put his order right; if you do, the motion will be dismissed." This is substantially what the Divisional Court did in the case in 31 O.R.—they said that certain unauthorised papers should be quashed, but further said that the whole matter could be set right at the next sittings of the Court; and gave no costs, as they would have done had prohibition lain: *Re McLeod v. Emigh* (2) (1888), 12 P.R. 503, and cases cited.

If it were considered that the decisions in cases from the Sessions compelled us to grant prohibition, contrary to the opinion just expressed, further considerations would arise.

The cases in our Courts after the change of the language by the Act of 1850, 13 & 14 Vict. ch. 54—"with or without costs to either party as to the Court shall seem meet"—carried into the new practice what had been and had necessarily been the former practice, viz., that the Court exercised, at least in form, a discretion as to the amount of the costs. In other words, it was considered that "with or without costs to either party as to the Court shall seem meet" meant the same thing as "award . . . such costs . . . as by the said Justices shall be thought most

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reasonable and just" or "such costs and charges as may to such Court appear just and reasonable."

This interpretation was, I think, probably due to the constitution of the Court and the desire to keep the former practice in force. It is too late now (at least for this Court) to change the interpretation to be placed upon the words of the statute in the case of the Sessions, which has had a long series of appeals from very early times, and a settled practice for as long; but the case is quite different where an appeal is given to another Court, whose practice is wholly different and equally well settled, having a tariff well established and officers to apply the tariff.

The Act R.S.C. 1906, ch. 85, sec. 335, gives an appeal to the County Court, as well as to the Sessions, at the option of the appellant, or he may appeal to a Superior Court—the Code, only to the Sessions or in certain cases to a Division Court. And it was to the County Court that the defendant took his appeal.

Suppose now the Act giving an appeal to the County Court had said: "The Court to which such an appeal is made shall hear and determine the matter of appeal and make such order therein, with or without costs to either party, including costs of the Court below, as seems meet to the Court . . ."—would there have been any doubt as to the meaning? Would it not mean that the Court should make such order as seems meet, and that this order should be "with or without costs as seems meet?" Would it be construed as meaning "with or without costs as seems meet, and, if with costs, costs to such an amount as seems meet?" The Court having a legal tariff, could the Court give any other than the tariff costs, if any? Making an order "with costs" means with the costs taxable between party and party in the Court making the order, if nothing more be said. It could not be successfully argued, I think, under such legislation, that the Court could give solicitor and client costs or costs on the High Court scale: *O'Farrell v. Limerick and Waterford R.W. Co.* (1849), 13 Ir. L.R. 365; *Re Bronson and Canada Atlantic R.W. Co.* (1890), 13 P.R. 440; or any more, in any case, than the taxable party and party costs in the County Court.

It may well be that a choice was given in this Act of going to the County Court rather than to the Sessions, from just such considerations—the appellant would know pretty well the worst

that could happen to him: and I see no impropriety in making the orders complained of. If it were not for the practice in the other Court, due, as I venture to think, to historical and other considerations, wholly wanting in the case of the County Court, no one would have thought that the language of the statute had any other meaning than that I am now suggesting.

At all events, there is such "doubt in fact (and) law whether the inferior Court is exceeding its jurisdiction, or is acting without jurisdiction," that we should exercise the discretion we have "to refuse a prohibition." Brett, J., in *Worthington v. Jeffries* (1875), L.R. 10 C.P. 379, at p. 384. If the Court doubt as to what is the true state of the facts or as to the law applicable to recognised facts, it is indisputable that the Court may decline to proceed further.

See also *Re Forster v. Forster and Berridge* (1863), 4 B. & S. 187, cited in the case in L.R. 10 C.P.; *Ex p. Smyth* (1835), 3 A. & E. 719, *per* Littledale, J., at p. 724; *Martin v. Mackonochie* (1879), 4 Q.B.D. 697, 734, *per* Thesiger, L.J.; *Carslake v. Mapledoram* (1788), 2 T.R. 473, *per* Buller, J.; *Bassano v. Bradley*, [1896] 1 Q.B. 645, *per* Russell, L.C.J.; *Ricardo v. Maidenhead Local Board of Health* (1857), 2 H. & N. 257, *per* Pollock, C.B.; *In re Birch*, 15 C.B. 743, *per* Jervis, C.J.

This consideration also enters into the case upon the earlier branch.

I am of opinion that the appeal should be dismissed with costs.

FALCONBRIDGE, C.J.:—I agree in the result.

*Appeal dismissed.*

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*Dower—Mortgaged Land—Mortgage to Secure Purchase-money—Bar of Dower—Sale of Land by Administrator of Deceased Mortgagor—Widow's Right to Sum in Lieu of Dower—Extent of Claim on Purchase-money—42 Vict. ch. 22, secs. 1, 2 (O.)—58 Vict. ch. 25, sec. 3 (O.)*

Land was purchased by and conveyed to A. in 1898. The purchase-price was \$3,000; and it was recited in the conveyance, which was dated the 1st November, 1898, that it had been agreed that \$2,800 of this sum should remain a lien upon the land, to be collaterally secured by a mortgage of it; and the grantor released to A. all his claims upon the land, "excepting the said lien for unpaid purchase-money and mortgage to be given therefor." The mortgage bore the same date, and A.'s wife joined in it to bar her dower. The mortgage-money was reduced by payment to \$1,700 in the lifetime of the mortgagor, and he died intestate on the 12th May, 1900, his wife surviving him. The land was sold by his administrator for \$5,250:—

*Held*, that the wife's dower was to be calculated on the proceeds of the sale of the land after deducting the amount remaining due upon the mortgage at the time of the death of A.

Review of the authorities and consideration of secs. 1 and 2 of 42 Vict. ch. 22 (O.) and sec. 3 of 58 Vict. ch. 25 (O.)

Decision of MIDDLETON, J., reversed.

MOTION by the administrator of the estate of Michael Auger, deceased, upon an originating notice under Con. Rule 938, for an order determining the rights as to dower of Sarah Auger, the widow of the deceased, in the lands devolving upon his death.

December 4, 1911. The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

*R. J. McLaughlin*, K.C., for the administrator.

*J. J. MacLennan*, for Sarah Auger.

December 15, 1911. MIDDLETON, J.:—The question arising upon this motion is, the basis upon which dower should be allowed to Sarah Auger, the widow of the deceased.

The late Michael Auger, who died on the 12th May, 1909, on the 1st November, 1898, purchased the lands in question for \$3,000—\$2,800 being secured by a vendor's lien and mortgage, in which his wife barred her dower. The deed and mortgage were practically contemporaneous transactions—the inference being that the deed was first delivered, as it contains a clause, "and the grantor releases to the grantee all his claims upon the said lands, excepting the said lien for unpaid purchase-money and the mortgage to be given therefor." The mortgage had been reduced to



\$1,700 before Auger's death; and, since his death, the lands have been sold for \$5,250, and the widow has joined the administrator in conveying; her rights being reserved for the opinion of the Court. The question is: has she a life interest in \$1,750, a third of this price, or in \$1,183.33, a third of the price less the mortgage?

*Smith v. Norton* (1861), 7 U.C.L.J. O.S. 263, a decision of the Court of Error and Appeal, determines that at common law the seisin of the husband was complete and the right to dower attached. Esten, V.-C., distinguishes the case from a conveyance operating under the Statute of Uses, where the grantee to uses is a mere conduit to convey the estate to the person entitled, saying that, where the mortgage and deed are one transaction, "the person is by the deed fully and perfectly seised of the estate until by his own act (not the act of another) he parts with it by executing the mortgage." The case then before the Court was an appeal from a common law Court, in an action of dower by the widow of the purchaser, who had not joined in the mortgage back to secure the purchase-money. It was intimated by some of the Judges that in equity the mortgagee might obtain relief.

In the next year a similar question arose in *Heney v. Low* (1862), 9 Gr. 265. There again the wife did not join in a mortgage to secure the balance of purchase-money. The purchaser sold the equity of redemption, and the original vendor, who still held the mortgage, obtained a reconveyance. On an action being brought, at law, for dower, a bill was filed in equity to restrain the action at law. The situation was complicated by the question of merger; but the question of the widow's right to dower in equity under the circumstances is also satisfactorily disposed of. Esten, V.-C. (p. 269), says: "Supposing, however, the true effect of the agreement to be, that S. in equity retained his mortgage, rather than took it back, so that it is equitably paramount to the title of dower, yet, undoubtedly, that title attached for every other purpose, and as against every other person. It could have been enforced against Low's heir. For every other purpose except to give priority to the mortgage the purchase-money must be considered paid, and the estate conveyed." Spragge, V.-C., after pointing out that the legal right to dower could not be denied, and that the mortgagee would be protected in equity, says of the purchaser of the equity of redemption (p. 277): He "surely could

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have no equity to prevent the assertion of Mrs. Low's legal title to dower. . . . She could claim her dower not against S., mortgagee, but against S., alienee of her husband; and I really do not see upon what principle this Court could interpose, unless in respect to the mortgage."

This being the situation when the wife does not join in the mortgage to bar her dower, her joining is, under sec. 10 of the Dower Act, 1909, to have no greater effect than necessary to secure the rights of the mortgagee.

Had the land been sold under this mortgage, sec. 10 (2) of the Dower Act would have applied and governed the widow's rights in the surplus money; but, where the land passes to the administrator, the rights of the parties are still regulated by *Robertson v. Robertson* (1878), 25 Gr. 486, and *Re Hague* (1887), 14 O.R. 660; and the wife, being a surety for her husband, has the right to cast the burden of the mortgage primarily on his estate. Neither the husband, nor any one claiming under him, has any equity which can be set up against her legal right to dower, which she has pledged as surety only for the husband's debt.

So declare. Costs out of the estate.

Certain of the next of kin of Michael Auger appealed from the order of MIDDLETON, J.

February 28, 1912. The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., TEETZEL and KELLY, J.J.

*D. Urquhart*, for the appellants, argued that the respondent was entitled to dower based upon the proceeds of the sale of the land, after deducting the amount remaining due upon the mortgage at the time of the death of her husband, and not upon the total proceeds of the sale of the land. He referred to *Campbell v. Royal Canadian Bank* (1872), 19 Gr. 334; *Pratt v. Bunnell* (1891), 21 O.R. 1; *Re Williams* (1903), 7 O.L.R. 156; *Norton v. Smith* (1860), 20 U.C.R. 213, at p. 217; *Parke v. Riley* (1866), 3 E. & A. 215; *Re Hopkins*, *Barnes v. Hopkins* (1879), 8 P.R. 160; *Gemmill v. Nelligan* (1894), 26 O.R. 307, at pp. 313, 315; *Strong v. Lewis* (1850), 1 Gr. 443, at p. 445; 42 Vict. ch. 22, secs. 1, 2 (O.); 58 Vict. ch. 25, sec. 3 (O.)

*J. J. MacLennan*, for the respondent, Sarah Auger, argued that the widow was entitled to dower based upon the total value

of the property. He referred to *Robertson v. Robertson*, 25 Gr. 486; *Doan v. Davis* (1876), 23 Gr. 207. The judgment below was right and should be affirmed.

*Urquhart*, in reply, referred to *Cameron on Dower*, p. 249, sec. 35.

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May 11. MEREDITH, C.J.:—This is an appeal by certain of the next of kin of Michael Auger, the husband of the respondent, from an order of Middleton, J., dated the 15th December, 1911, declaring the respondent to be "entitled to dower in the full value of the lands of which he was seised at the time of his decease, payable out of the proceeds of the sale thereof now in the hands of the administrator, in priority to all other claims against the estate of the said Michael Auger."

Auger owned at the time of his death the equity of redemption in the land as to which the question arises. The land was purchased by him from Henry Gooderham, and the conveyance to Auger bears date the 1st November, 1898. The purchase-price is stated to be \$3,000; and one of the recitals in the conveyance is, that it had been agreed that \$2,800 of this sum should remain a lien upon the land, to be collaterally secured by a mortgage of it.

The release clause, according to the statutory form, is altered to read as follows: "And the said grantor releases to the said grantee all his claims upon the said lands, excepting the said lien for unpaid purchase-money and mortgage to be given therefor."

The mortgage bears the same date, and the respondent joined in it to bar her dower.

The mortgage-money was reduced by payment to \$1,700 in the lifetime of the mortgagor, and he died intestate on the 12th May, 1909. The land has been sold by his administrator for \$5,250; and the question for decision is, whether the respondent's dower is to be calculated on the proceeds of the sale of the land or only upon the proceeds after deducting the amount remaining due upon the mortgage at the time of the death of her husband.

Before any legislation on the subject, it had been held, in *Campbell v. Royal Canadian Bank*, 19 Gr. 334, that where a wife joins with her husband to bar dower in mortgage to secure the purchase-money of mortgaged lands, and the husband dies, and the mortgaged land is sold to satisfy the mortgage, she is

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entitled to dower in the proceeds after satisfying the mortgage debt, but no more. The Chancellor (Spragge) delivering judgment said that "by the sale the purchaser stands in the place of the heir, and occupies, as to the widow, the same relative position that the heir had done;" and that he thought "it must now be taken as settled that, as between the widow and creditors, she is dowerable only in respect of the value of the land in excess of the incumbrance, *i.e.*, of course, in a case where, as in this case, she is bound by the incumbrance."

These observations do not appear to be limited to cases in which, as in the one he was dealing with, the mortgage is for unpaid purchase-money, and it may be that he did not intend them to be so limited.

However, in the subsequent case of *Doan v. Davis*, 23 Gr. 207, where the mortgage was not given to secure unpaid purchase-money, the same learned Judge held that the widow was entitled to dower out of the whole value of the mortgaged premises, and not only out of their value beyond the mortgage-debt.

*Doan v. Davis* was approved and followed by Proudfoot, V.-C., in *Lindsay v. Lindsay* (1876), 23 Gr. 210.

In *Robertson v. Robertson*, 25 Gr. 486, it was decided, as the head-note states, "that a woman is entitled to dower in lands on which she and her deceased husband had joined in creating a mortgage to secure a debt of the husband; and that in ascertaining such dower the value of the whole estate is the basis of computation, not the amount of surplus after discharging the claim of the mortgagee." That was the conclusion reached by a majority of the full Court on the rehearing of an order pronounced by Proudfoot, V.-C., a report of whose judgment is found in *Re Robertson* (1877), 24 Gr. 442.

The Vice-Chancellor there expressed his approval of the opinion of VanKoughnet, C., in *Sheppard v. Sheppard* (1867), 14 Gr. 174, notwithstanding that the same learned Judge, in the later case of *Thorpe v. Richards* (1868), 15 Gr. 403, had expressed a doubt whether he had not gone too far in the former case, in giving the wife the value of her dower in the entire estate, as against the creditors of her husband; and the learned Vice-Chancellor pointed out that it was not necessary in the later case to consider that question. The Vice-Chancellor also referred to two decisions of



Mowat, V.-C., *White v. Bastedo* (1869), 15 Gr. 546, and *Baker v. Dawbarn* (1872), 19 Gr. 113, to the effect that "the widow was not entitled, as against creditors, to the exoneration of the mortgaged estates from the mortgage out of either the personal estate or the other real estate left by her insolvent husband at the time of his death;" and distinguished these cases on the ground that there does not appear to have been any surplus from the mortgaged property after payment of the incumbrances.

*Campbell v. Royal Canadian Bank*, so far as it is a decision that, where a wife joins in a mortgage by her husband to secure unpaid purchase-money, she is not entitled to dower in the value of the land, but only on the value after deducting the mortgage-debt, was never questioned, and was referred to with approval by Proudfoot, V.-C., in *Lindsay v. Lindsay*, at p. 213, and again in *Robertson v. Robertson*, 25 Gr. at p. 501, where he says: "Where the mortgage has been given for the purchase-money of the land, it is quite reasonable that the widow should only have dower in the value of the land after deducting the amount of the mortgage, for that was the extent of the beneficial interest of the husband. That was the case in *Campbell v. Royal Canadian Bank*."

I refer also to *Re Croskery* (1888), 16 O.R. 207, and *Re Williams*, 7 O.L.R. 156.

In this state of the decisions, 42 Vict. ch. 22 was enacted.

By its first section that Act provides:—

"1. No bar of dower contained in any mortgage, or other instrument intended to have the effect of a mortgage or other security, upon real estate, shall operate to bar such dower to any greater extent than shall be necessary to give full effect to the rights of the mortgagee or grantee under such instrument."

And by sec. 2 it is provided:—

"2. In the event of a sale of the land comprised in any such mortgage or other instrument, under any power of sale contained therein or under any legal process, the wife of the mortgagor or grantor who shall have so barred her dower in such lands, shall be entitled to dower in any surplus of the purchase-money arising from such sale, which may remain after satisfaction of the claim of the mortgagee or grantee, to the same extent as she would have been entitled to dower in the land from which such surplus purchase-money shall be derived had the same not been sold."

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It has been generally understood, I think, that what led to this legislation was the uncertainty as to the law as evidenced by the conflicting decisions, to some of which I have referred, and that the purpose of sec. 1 was to declare the law as it had been held to be in *Campbell v. Royal Canadian Bank*, and *Robertson v. Robertson*. Section 2 was intended, as was said by Patterson, J.A., in *Martindale v. Clarkson* (1880), 6 A.R. 1, 6, to give the wife a new right in a case where she had joined in the mortgage, her husband having at the time the legal estate, and the land was subsequently sold under a power of sale in the mortgage or under legal process. The nature of this new right was considered and explained by Ferguson, J., in *Re Luckhardt* (1898), 29 O.R. 111, the present Chancellor agreeing with the opinion he there expressed.

The principle upon which the Court of Chancery proceeded before this statute was, that a wife who joined in a mortgage for the purpose of barring and barred her dower in the mortgaged lands, barred it only for the purpose of the security given to the mortgagee; and that is what, in substance, sub-sec. 1 provides; and it follows, I think, that the widow's rights under sub-sec. 1 are no greater than they had been decided to be in the view of the Court of Chancery as to the effect of the bar of dower before the statute; and that was to have dower in the surplus calculated on the full value of the land, where the mortgage was to secure a debt of the husband, except where the debt was for unpaid purchase-money of the mortgaged land, and in that case calculated on the value in excess of the incumbrance.

By a later Act, 58 Vict. ch. 25, sec. 3, it was provided:—

“3. In the event of the land, comprised in any mortgage or other instrument hereafter executed by which the mortgagor's wife barred her dower, being sold under any power of sale contained in the mortgage, or under any legal process, the wife shall be entitled to dower in any surplus of the purchase-money arising from such sale, which may remain after satisfaction of the claim of the mortgagee or grantee, to the same extent as she would have been entitled to dower in the land had the same not been sold; and the amount to which she is entitled shall be calculated on the basis of the amount realised from the sale of the land, and not upon the amount realised from the sale over and above the amount of the mortgage only. This section shall not apply where the mortgage

is for the unpaid purchase-money of the land; and nothing in this section contained shall be construed to affect, by implication or otherwise, any question in the case of mortgages heretofore executed."

Except for the provision as to the basis for calculating the amount to which the wife is to be entitled for her dower, this section does not differ in substance from sec. 2 of the Act of 1879.

While sec. 3 applies only to cases in which the mortgaged land has been sold under a power of sale in the mortgage or under legal process, it, like sec. 2 of the earlier Act, provides that the wife is to be entitled to dower in the surplus to the same extent as she would have been entitled to dower in the land had it not been sold; and in the provision as to the basis for calculating the amount to which the wife is to be entitled, the Legislature indicates, I think, that the draftsman was under the impression that that would have been the measure of the wife's rights if the land had not been sold.

If the order appealed from is right, as sec. 3 is confined to cases in which the land is sold under power of sale in the mortgage or under legal process, it would follow that in other cases a different rule would be applicable, and in them the widow's dower would be calculated on the basis of the value of the land irrespective of whether or not the mortgage was given to secure purchase-money. I can see no reason for such a distinction, and this affords, I think, an additional reason for construing sec. 1 of the Act of 1879 as I have construed it.

I am, for these reasons, unable to agree with the opinion of my brother Middleton, and am of opinion that the appeal should be allowed, and that there should be substituted for the declaration which he made, a declaration that the respondent is entitled to dower in the purchase-money of the mortgaged land, after deducting from it the amount which remained owing on the mortgage at the time of her husband's death; and there should be no order as to the costs of the appeal or the costs of the proceedings before my brother Middleton.

TEETZEL, J.:—I agree.

KELLY, J.:—I agree in the result.

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*Appeal allowed.*

## [IN THE COURT OF APPEAL.]

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May 15

## PATTISON V. CANADIAN PACIFIC R.W. CO.

*Railway—Crossing of one Railway by another—Interlocking Plant—Signalman—Negligence—Liability of Employer-company—Master and Servant—Action against both Companies—Judgment—Leave to Appeal.*

*Held*, reversing the judgment of BOYD, C., 24 O.L.R. 482, that the signalman at the point of crossing of the tracks of the two defendant companies, whose negligence caused the death of the plaintiff's husband, was the servant, not of the Canadian Pacific Railway Company, but of the Canadian Northern Railway Company, and that company was liable for his negligent act; GARROW, J.A., dissenting.

The Canadian Pacific Railway Company having successfully appealed from the judgment given against it, the plaintiff was allowed to appeal as against the Canadian Northern Company and to have judgment against that company.

APPEAL by the defendant the Canadian Pacific Railway Company from the judgment of BOYD, C., 24 O.L.R. 482.

January 18. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*I. F. Hellmuth*, K.C., and *Angus MacMurchy*, K.C., for the appellant. Frank Leland, whose negligence was the cause of the accident, was not the servant of the appellant. The evidence shews that Leland was appointed to take charge of the crossing by the Canadian Northern Railway Company, in pursuance of an order of the Board of Railway Commissioners, and that the appellant had no part or voice in his selection, appointment, hiring, or dismissal, exercised no supervision, discretion, or control over him in the performance of his duties, and was not responsible to him for his wages, nor was he responsible to the appellant for the performance of his duties or subject to the appellant's direction or control: *General Steam Navigation Co. v. British and Colonial Steam Navigation Co.* (1868-9), L.R. 3 Ex. 330, L.R. 4 Ex. 238; *Grand Trunk R.W. Co. v. Huard* (1905), 36 S.C.R. 655, especially at p. 670; *Stewart v. Pere Marquette R.W. Co.* (1905), 6 O.W.R. 724; *Donovan v. Laing Wharton and Down Construction Syndicate Limited*, [1893] 1 Q.B. 629; *Hansford v. Grand Trunk R.W. Co.* (1909), 13 O.W.R. 1184; Fourth Annual Report of the Board of Railway Commissioners, p. 304. The learned trial Judge erred in regarding Leland as a joint or common servant of the two defendants, or as alternately the servant of the one or the other of



them according to the service performed and benefit received by each. The rule of *respondeat superior* arises out of the relation of superior and subordinate; and we submit that this relationship did not exist between the signalman and the appellant.

*Wallace Nesbitt*, K.C., and *Christopher C. Robinson*, for the defendant the Canadian Northern Railway Company. Frank Leland, whose negligence was the cause of the accident, was appointed under and by virtue of the authority contained in an order of the Board of Railway Commissioners for Canada. We submit that this respondent exercised reasonable and proper care in appointing Leland as signalman, as he was a competent person, and his work was satisfactory to the appellant. Under the terms of the order of the Board, this respondent was only the paymaster, inasmuch as the wages of the signalman were reimbursed by the Canadian Pacific Railway Company. At the time of the accident, Leland was engaged in the work of passing a train of the appellant across the diamond, and this respondent was in no way interested in such work, and derived no benefit therefrom, nor was Leland subject to the control of any officer of this respondent. We submit that Leland, while so engaged, was under the sole control and direction of the appellant, and was the servant of the appellant alone. This respondent is, therefore, not liable for the consequences of Leland's negligence. A.'s servant may become B.'s on a particular occasion and for a particular purpose, notwithstanding that he continues in A.'s service and is paid by him: *Union Steamship Co. Limited v. Claridge*, [1894] A.C. 185, at p. 188. It is the company for which the act is being performed at the time that is responsible, where the servant has been compulsorily appointed. We refer to the following authorities: *Warburton v. Great Western R.W. Co.* (1866), L.R. 2 Ex. 30; *Swainson v. North Eastern R.W. Co.* (1878), 3 Ex. D. 341; *Hansford v. Grand Trunk R.W. Co.*, 13 O.W.R. 1184; *Hall v. Lees*, [1904] 2 K.B. 602.

*C. A. Moss*, for the plaintiff, asked, in the event of the appeal being allowed, for leave to appeal as against the Canadian Northern Railway Company, and for judgment against that company.

*Hellmuth*, in reply, referred to *Dewar v. Tasker and Sons Limited* (1907), 23 Times L.R. 259; *The Sussex*, [1904] P. 236,

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at p. 251; *The Halley* (1868), L.R. 2 P.C. 193; *Jones v. Scullard*, [1898] 2 Q.B. 565, at p. 573.

May 15. Moss, C.J.O.:—This appeal, though nominally and in form an appeal against the plaintiff, is in substance and reality an appeal against the defendant the Canadian Northern Railway Company. At the trial, and again on the argument of the appeal, it was admitted that the unfortunate accident which caused the death of the plaintiff's husband was due to the gross negligence of one Frank Leland, who was operating the points and signals in connection with the interlocking plant at Ward's crossing.

The amount of damages to be paid by the company ultimately held liable was agreed upon and fixed at \$4,250.

The only question tried and debated was, which one of the defendants was answerable for the consequences of Leland's negligent act?

The solution of that question is to be found by ascertaining from the facts established in evidence whose servant Leland was, in fact and law, when he committed the negligent act. And, as has been many times observed, the answer depends upon the facts and the proper inferences to be drawn from them. The recent case in the House of Lords of *McCartan v. Belfast Harbour Commissioners* (1910), reported in 44 Irish Law Times 223, was one in which action was brought for personal injuries to the plaintiff while engaged in helping to unload a ship. A crane, the property of the defendants, was hired to the master of the ship for unloading purposes. The crane was in charge of and worked by a servant employed by the defendants. The plaintiff was working under employment by the master of the ship, and was injured through the negligence of the craneman. There was judgment for the plaintiff, and ultimately an appeal to the House of Lords. It was contended for the defendants that *quoad* the work on which he was engaged at the time of the accident the craneman was the servant of the master of the ship, and not the defendants' servant. The Lord Chancellor said: "I regard this case as one purely of fact, in which no point of law is in dispute. The question on which the decision hinges is this—Was the man, whose negligence caused this accident, acting as servant of the defendants in doing what

led to the mishap, or as servant to the master of the vessel which was being unloaded?" And Lord Dunedin said (p. 226): "There is no principle involved in . . . this case except the principle which I have already mentioned, which is compendiously described by the brocard *respondeat superior*, and as to which no one entertains any doubt. The application of that principle to each particular case depends upon facts, and is a question of fact . . ."

The present case having been tried without a jury, and there being no substantial difference as to the facts, we are free of the difficulties which sometimes arise in dealing with findings upon disputed facts. It only remains to endeavour to make the proper application of the facts and the inferences to be drawn from them, in order to ascertain which of the two companies is liable.

The learned Chancellor has held the defendant the Canadian Pacific Railway Company liable, basing his conclusion, as I read his opinion, upon three grounds: (a) that, Leland being the common signalman, the proper legal outcome as to liability in case of negligence is, that he was to be regarded as the person employed by the company for which he was adjusting the points and giving the signals; (b) if the order of the Board of Railway Commissioners, coupled with its directions, be regarded as a *quasi* contract or in the nature of a contract between the companies, the rules of common law would place liability on the company which was making use on its own line of the common servant for the sole prosecution of its sole work at the crossing; (c) or if, rejecting the theory of joint service, and regarding Leland, appointed and paid in the manner in which he was, as the servant or agent *sui generis* of both companies, then fairness and good sense would support the proposition that the company for whom he was alone acting on the particular occasion was the principal against whom relief should be sought in case of misconduct on Leland's part occasioning injury to an employee of the last-mentioned company.

But, however strongly these propositions may appear to be consistent with what should be fair as between the two companies, I am, with deference, unable to think that they can be considered as decisive of the question in issue here. In order to give effect to them, it must be first found that Leland was the common servant of the companies. He was, it is true, the common signalman,

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in the sense that he was the only one in charge; but it by no means follows that he was the servant of both companies. It must depend upon the circumstances of his engagement, the nature of the duties he owed to the respective companies, and the extent of the control over his conduct and actions vested in each of them.

The occasion for the employment of a person performing the duties which Leland was engaged in, arose out of the application of the Canadian Pacific Railway Company to the Board of Railway Commissioners for leave to cross the track of the Canadian Northern Railway Company's spur line to their gravel pit at the point in question. The Board granted the leave, but directed that the Canadian Pacific Railway Company should, at its own expense, under the supervision of an engineer of the Canadian Northern Railway Company, insert a diamond in the track of the latter company at the point of crossing, and that the crossing be protected by an interlocking plant, derails to be placed on the lines of both companies on both sides of the crossing, the derails to be interlocked with home and distant signals. Then followed directions bearing directly on the question here, viz.: (4) that, during such period of the year as the line of the Canadian Northern is not being operated, the signals and derails be set and placed so as to permit the crossing to be safely made by trains of the Canadian Pacific, without stopping, and that, during such period, it shall not be necessary to have a man in charge of such crossing; (5) that the Canadian Northern Railway Company be entitled to place a man in charge of such crossing whenever the said line is to be operated by that company, upon giving to the Canadian Pacific Railway Company at least 48 hours' previous notice in writing of its intention so to do.

Thus far it will be seen that, so long as the Canadian Northern Railway Company is not operating its line, no necessity for having a man in charge of the crossing exists, and it is only when the Canadian Northern Railway Company desires to operate its line that a man is to be placed in charge. Until the arrival of that time, the Canadian Pacific was free to use its line for all proper and legal purposes without hindrance at the crossing. The next material directions are: (7) that the man in charge of the interlocking plant be appointed by the Canadian Northern; and (8)



that the Canadian Pacific bear and pay the whole cost of providing maintaining, and operating the interlocking plant, including the cost of keeping a man in charge of the crossing. With these should be read the stipulations of clause (6) that, in the movement of trains of the same or of a superior class over the crossing, the trains of the Canadian Northern have priority.

So that, when the occasion for placing a man in charge arises, his appointment is to be made by the Canadian Northern, and he is to be paid in the first instance by it. The Canadian Pacific is to indemnify the Canadian Northern for the cost of keeping him in charge, but otherwise there is nothing expressed which would give the Canadian Pacific any control over or power of interference with him in the performance of his duties. Complete control of the interlocking plant and of the man in charge is left to the Canadian Northern, and in the movement of trains its are to have priority. The evidence shews that the two companies so interpreted the effect of the order. The man in charge was invariably appointed by the Canadian Northern without any previous communication with the Canadian Pacific; and it nowhere appears that it ever interfered with the man in the performance of his duties. It was, of course, open to the Canadian Pacific to complain to the Canadian Northern in case of neglect or failure of the man to attend to his duties; but it had no power to dismiss or even suspend him. It was, of course, part of his duty to pay attention to the signals from trains of the Canadian Pacific approaching the crossing, and to set and place the signals and derails so as to permit the crossing to be safely made as soon as the traffic on the Canadian Northern Railway Company's line permitted. But such acts as these cannot be so classed as to convert them into orders or directions given to him as a servant of the Canadian Pacific Railway Company. As the case appears to me, it is the simple case of a man employed and paid by the Canadian Northern Railway Company, subject only to its orders and subject only to dismissal by it, acting on its behalf as the company having sole control of the interlocking plant, but under obligation to permit the crossing to be safely made by the Canadian Pacific Railway Company's trains, though in subordination to the Canadian Northern Railway Company's trains.

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And, in my opinion, no question of joint or common employment or agency arises. Leland was at the time engaged in permitting a Canadian Pacific train to make the crossing in response to its signal, and his negligent act was in displacing the points after he had permitted the train to proceed.

I think that negligent act was committed by Leland as the servant of the Canadian Northern Railway Company, and that it should be held liable for the damages.

This conclusion gives rise to another question, which was raised and partially discussed upon the argument of the appeal. The plaintiff has not appealed against the Canadian Northern Railway Company, nor asked that, if the judgment against the Canadian Pacific Railway Company be set aside, judgment for the damages should be entered against the Canadian Northern Railway Company. Upon the argument of the appeal, counsel for the plaintiff asked to be allowed to appeal so as to obtain judgment against the Canadian Northern Railway Company.

The case seems a proper one for giving this relief, and it should be granted. But the Canadian Northern Railway Company may be advised that, in order to render unnecessary any further argument, it would be proper to submit to judgment in the same way as if an appeal had been brought by the plaintiff in the first instance.

In that case, judgment may go setting aside the judgment against the Canadian Pacific Railway Company, and directing judgment to be entered against the Canadian Northern Railway Company, with costs throughout to the plaintiff and the Canadian Pacific Railway Company.

If, however, it is deemed necessary by any of the parties, the matter may be mentioned again.

MACLAREN, J.A., concurred.

MEREDITH, J.A.:—I am quite unable to agree with the trial Judge in his views of this case.

I am quite unable to understand how any one who does not hire or pay, and who cannot discharge, order, or control, a servant employed and paid and subject to discharge by, and to the orders and control of, another person only, can be considered the master of or answerable for the misconduct of such a servant: manifestly,

I would have thought, the master could be only he who employed, paid, and discharged the servant, and to whose orders and control solely he was subject.

In this case the Canadian Northern Railway Company hired, paid, and discharged all the signalmen of the crossing where the accident happened, who were all subject to the orders and control of that company solely. The Canadian Pacific Railway Company had no voice in any of these things, they had no power whatever over any of them, nor ever assumed or attempted to exercise any authority respecting them: their only right was that of any other stranger to the contract between master and servant, to complain to the master if they had fault to find with any act of the servant; but even that was never done.

How then is it possible, rightly, to hold the Canadian Pacific Railway Company liable for his negligence in the performance of his duties in such a service? Because that company was bound to recoup the other in the amount expended in his wages, cannot have any such effect: see *The Slingsby* (1903), 120 Fed. Repr. 748, and *Swainson v. North Eastern R.W. Co.*, 3 Ex.D. 341.

The narrow ground upon which the trial Judge held that the Canadian Pacific Railway Company is liable, was, in my opinion, based upon error in fact as well as in law. It is not a fact that, in doing that which caused the accident, the signalman was acting upon the request, or at the instance, or for the benefit, of that company. When their train was approaching the crossing, the signals of safety were set upon the line which gave them a clear right of way: there was no need for, or to signal for, any service on the part of the signalman; it was the right and the duty of the train to go on as it did; the difficulty arose not from any service needed or asked for by those in charge of the train, but by reason of the other company's tipsy servant interfering with that train's right of way, not at the request or instance of the Canadian Pacific Railway Company or for their benefit, but wholly and diametrically opposed to their interests and desires. On the contrary, it was for the benefit of the other company, because his actions made its line safe, in making the Canadian Pacific Railway Company's line unsafe, and throwing the train off the track and killing the plaintiff's husband. It ought not to be necessary, but it seems to be, to say that in making the one line safe the other is

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necessarily made unsafe; that is the purpose of the interlocking apparatus: in opening the "derailing" switch on the one line, that switch is automatically closed on the other line, giving the only safe right of way to the latter.

One might well differ from the trial Judge with greater hesitancy, were it not that he was under a misapprehension of some of the very material facts of the case when disposing of it; the Canadian Northern Railway Company was not ordered by the Railway Board "to appoint a competent man" to be in charge of the crossing; the order was, that they "be entitled to place a man in charge of such crossing," when the line was to be put in use by them, upon giving forty-eight hours' previous notice to the other company. The Canadian Northern Railway Company did not use at all times this part of its road; and so it was at liberty to withdraw the signalman whenever it saw fit not to use it; at which times, if it did its duty, it would see that this interlocking switch was securely locked so as to give the right of way all the time to the other company's line; and so the signal service was all the more under its control and in its charge and keeping.

It was also incorrect to say, as the trial Judge did, in his reasons for deciding against the Canadian Pacific Railway Company, that a competent man was appointed to the satisfaction of that company; that company was in no way consulted about the appointment of any of the several signalmen, and knew nothing about them, nor had anything to do with them, but had to, and did, submit to all such appointments as the other company chose to make.

So, too, to say that the signalman was in the service of the Canadian Pacific Railway Company, which paid him and concurred in his appointment; and that the service at the time and place in question was being performed solely on behalf of and for the benefit of that company. If these things had been as they are incorrectly stated, a very different case would be presented for consideration on this appeal.

Judging only from the quotation from them made by the trial Judge, it seems to me to be obvious that the views expressed by the Chairman of the Railway Board, upon the application which was then before him, which had nothing to do with this matter, have been misapplied to this case. The Chairman was evidently



dealing with the question of what should be the form and effect of the order to be made upon an application for crossing facilities; not in any sense as to the effect of the order which had been made in this matter; if it had been otherwise, I cannot think that any one could agree with him; as they are even, there may be very different opinions.

It would certainly be a new and unfortunate state of affairs if one were to be held answerable in damages for the misconduct of a servant in whose appointment he had no voice, and who was not subject to his orders or control, nor hired or paid by him, and who was not acting upon his request or at his instance or for his benefit, but the very opposite, in the misconduct which caused the injury: a man to whose directions, at the crossing, they were bound to conform: not he to theirs.

The case seems to me to be a very plain one of liability of the Canadian Northern Railway Company at common law; and not of liability of the Canadian Pacific Railway Company under the Workmen's Compensation for Injuries enactments, or otherwise.

Since this opinion was written, I have had an opportunity of perusing the ruling of the Railway Commissioners referred to in it, and find that it is entirely in accord with the views I have expressed in all respects. It is there said by the Chief Commissioner, among other things: "I think, in all cases where the Board has made crossing orders, the man in charge of the interlocker has been regarded as the employee of the senior"—the Canadian Northern Railway—"company only, in which event, if, through his carelessness or negligence, damages arise to the servants or employees of the junior company, recovery must be had against the junior company."

MAGEE, J.A.:—The Railway Act, R.S.C. 1906, ch. 37, in sec. 151, clause (c), gives each company the power to cross any railway, as by clause (d) it gives power to carry the railway across the lands of any person; but, by sec. 227, it directs that the cars shall not so cross another railway until leave therefor has been obtained from the Board of Railway Commissioners; and, upon application for such leave, the Board may direct that such works and appliances be installed, maintained, and operated, watchmen or other persons employed, and measures taken, as appear to the Board

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best adapted to prevent danger, and may make other directions; and, by sec. 229, at any such crossing at rail level the Board may order the adoption of such interlocking switch, derailing device, signal system, and appliances, as to render it safe for trains to pass over the crossing without being brought to a stop.

In 1908 the Canadian Pacific Railway Company, which I may call "the Pacific," desired to cross this spur-line of the Canadian Northern Railway Company, which may be called "the Northern," and it did not desire to do so overhead or by a subway, but at rail level; and it made application to the Board to vary a previous order of the 26th December, 1906, by granting permission to use the crossing for other than construction purposes and by having the crossing protected by home and distant signals. The Board's order of the 29th April, 1908, gave: (1) the leave to cross; but directed (2) that the Pacific company, at its own expense, under supervision of an engineer of the Northern company, should insert the diamond at the crossing; (3) that it should be protected by an interlocking plant, derails to be placed on the lines of both companies on both sides and to be interlocked with home and distant signals; (4) that, during such period of the year as the Northern line is not being operated, the signals and derails be set so as to permit the Pacific trains to cross without stopping, and then it should not be necessary to have a man in charge of the crossing; (5) that the Northern company "be entitled to place a man in charge" of such crossing whenever the line is to be operated by that company, upon giving notice to the Pacific company; (6) that the Northern company's trains have priority; (7) that the man in charge be appointed by the Northern company; and (8) that the Pacific company bear and pay the whole cost of providing, maintaining, and operating the interlocking plant, including the cost of keeping a man in charge of the crossing. By another order, of the 7th May, 1908, on the Pacific company's application, and on the recommendation of the Board's engineer, "the applicant company and the railway company," which I suppose means both companies, were authorised to operate trains over the crossing without being brought to a stop.

Among the rules adopted by the Board for interlocking systems at crossing at rail level, one provides that "when the signals on the distant and home posts indicate safety, the train can proceed."

In September, 1910, the crossing was in operation, and the Northern company was using the spur-line for hauling gravel and other purposes, but the Pacific company had five or six times as many trains crossing as the Northern company. A signalman was in charge, and operated the signals and derails on both lines from a tower, which seems to have been located on the land forming the original right of way of the Northern company, though that is not very clear. No part of that land seems to have been acquired by the Pacific company.

The Pacific company's train, on which the plaintiff's husband was fireman, was proceeding to cross without stopping, as the signals indicated safety, and the signalman in the tower, negligently and without cause or warning, operated the derailing switch on the Pacific company's property and derailed the train, and the fireman was killed.

The negligent signalman had been selected and appointed solely by the Northern company, and was subject only to its control and to dismissal by it. He made reports periodically to that company, and only to it. The Pacific company was not consulted or entitled to be consulted as to his appointment or retention, and had had no voice therein. It could not discharge or even suspend him, and at the most could only complain of any misconduct by him to his employer, the Northern company—but, no doubt, had an ultimate right of complaint against that company itself to the Railway Commissioners. His wages were agreed upon between him and the Northern company and paid by that company without consultation with the Pacific company, but were reimbursed by the latter company to the Northern. He was furnished by the Northern company with its rules for crossings. He also had a copy of those of the Pacific company, but it does not appear how he obtained them. The rules of both companies are, in effect, if not literally, the same, both being approved by the Board. It was necessary for him to have time-tables of both companies, and they were furnished to him. The Northern company's superintendent says that that company "gave instructions to him in connection with the operation." It does not appear that the Pacific company gave any instructions. It is stated that generally the senior company—the company whose

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line is subsequently crossed by another—has the privilege of appointing the signalman at crossings.

As the signalman was not required when the Northern company was not operating that line, nor before the crossing was made, it cannot be said that he was employed for the service of either company as regards danger from its own trains, appliances, or employees. He was authorised to use appliances and perform operations therewith on the Pacific company's property, but any danger he was there to prevent would be a common danger to both companies, and, therefore, never a danger of the Pacific company, apart from danger to the Northern company, his employer. In setting the signals and rails properly for "safety" on the Pacific line, he was doing no more than saying that his employer's trains or track were not going to interfere with the train. In wrongfully moving the derailling appliance, he was saying, "There is danger to my employer's property as well as to you." What actuated him to do as he did does not appear, but it is not at all likely, and it certainly is not proved, that he was seeking to save the Pacific train alone from danger on the Pacific line. What happened was much the same as if the railway watchman at a highway crossing were to signal to a teamster that it would be safe to cross, and then drop the bar across the horse's back.

It is true that the train was derailed by means of an appliance put on the Pacific track by the Pacific company, and which that company assented to being used by the Northern company, through its signalman; but they did not assent to his doing so negligently or improperly, and there was no negligence in giving such assent.

It is not the fact that the engineer or any employee of the Pacific company signalled for any movement of the signals or switches, either then or ordinarily. The signalman of the Northern company controlled the right of the Pacific company's trains to cross, but no employee of the Pacific company had any authority over the signalman.

It is true that the Pacific company had applied for the protection of the crossing by signals, and the signals would necessitate a signalman; but they did not ask for or obtain the control in any way of the signalman. As appears, it is usual for the "senior" company at railway crossings to appoint the signalman. In fact



the Pacific company did no more than a municipality might do which asked that a railway company should maintain a watchman at a highway crossing.

From the decision of the Board of Railway Commissioners (report for 1909, 44 Sessional Papers, 1910, 20 c., p. 304), mentioned by the learned Chancellor, it is apparent that it was the view of the Board, and it would seem of the railway companies themselves, that, in taking the appointment of the signalman, the senior company was assuming a serious responsibility, which it was felt they should not in future orders be subjected to, and the Board decided that in future orders, made after the 1st October, 1909, it would be provided that the signalman should be regarded as an employee of both senior and junior companies.

Apart from that view, upon the facts here it does not appear that the negligent signalman was in fact, in any sense, in the service of the Pacific company, or that, at the moment of his negligent action or in taking the course he did, he was for the time being acting otherwise than as the servant of the Northern company, which, through him, was unwarrantably placing an obstruction upon the Pacific company's property in the way of the train.

This appeal of the Pacific company should, in my opinion, be allowed, and the plaintiff should have leave to appeal against the judgment in favour of the Northern company; and I agree in the proposed disposition of the costs.

GARROW, J.A. (dissenting):—The plaintiff sues on behalf of herself and the infant children of her late husband, Samson Pattison, to recover damages resulting from his death on the 10th September, 1910, through the alleged negligence of the defendants or of one of them.

The amount of the damages was agreed upon at the trial at the sum of \$4,250.

The deceased, Samson Pattison, was in the employment of the defendant the Canadian Pacific Railway Company, as a locomotive fireman. On the occasion in question, he was employed upon an engine attached to a train proceeding from the city of Winnipeg easterly. About seven miles east of Winnipeg, at a place called Wood Crossing, the line of railway of the defendant the Canadian Pacific Railway Company crosses the line

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of the defendant the Canadian Northern Railway Company, and what there occurred is thus expressed in the statement of claim and admitted in the statement of defence of the defendant the Canadian Pacific Railway Company:—

“5. Upon approaching the said crossing, the train upon which the said Pattison was working was given the through signal from the distance signal, and, in pursuance of such signal so given, was proceeding along the track, and, when nearing the home signal, the signal was suddenly, through the negligence of the man in charge of the same, reversed, and the derail switch thrown open, thus causing the train to be derailed, which resulted in Pattison's death.”

The man in charge of the signals at the crossing was one Leland, who was afterwards prosecuted for manslaughter and convicted. And the sole question in the case is, which of the two defendants should be held responsible for Leland's negligence.

The facts as to Leland's appointment are as follows. The defendant the Canadian Northern Railway Company had what is called a spur line of railway leading to certain gravel pits, used only to reach them. The defendant the Canadian Pacific Railway Company desired to cross this line, and made application for that purpose to the Board of Railway Commissioners for Canada for an order permitting such crossing to be made. And an order dated the 29th April, 1909, was accordingly made. By the terms of the order, it was provided, among other things, that the defendant the Canadian Northern Railway Company should appoint and place a man in charge of the crossing, and that the defendant the Canadian Pacific Railway Company should bear and pay the whole cost of providing, maintaining, and operating the interlocking plant which the order directed should be established at the crossing, including the cost of keeping the man in charge at the crossing.

In pursuance of the order, the interlocking apparatus was put in, and the crossing duly established.

The defendant the Canadian Northern Railway Company appointed Leland and placed him in charge at the crossing on the 30th April, 1909; and he remained in charge until the accident on the 10th September, 1910. He was paid his wages in the first instance by the defendant the Canadian Northern Railway Com-

pany, but that company was fully recouped in respect of such wages by the defendant the Canadian Pacific Railway Company.

The learned Chancellor held that the defendant the Canadian Pacific Railway Company alone was liable, under the circumstances, for the damages agreed upon, with costs of action; and with that conclusion I agree.

Such cases are always, in my experience, somewhat difficult of easy solution, largely, I suppose, owing to the somewhat nice distinctions and discriminations which must be made. The law itself seems plain and simple enough. It is the facts and the inferences of fact which are troublesome.

The principle of *respondeat superior*, upon which they all rest, is thus expounded by Best, C.J., in *Hall v. Smith* (1824), 2 Bing. 156, at p. 160: "The maxim of *respondeat superior* is bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it." And that a person may, while the general servant of one person, become the particular servant as to a particular act of another person, in other words, serve two masters, cannot now be disputed, in the light of the authorities.

In *Union Steamship Co. v. Claridge*, [1894] A.C. 185, at p. 188, Lord Watson said: "That the servant of A. may, on a particular occasion, and for a particular purpose, become the servant of B., notwithstanding that he continues in A.'s service and is paid by him, is a rule recognised by a series of decisions;" to some of which I referred in *Hansford v. Grand Trunk R.W. Co.*, 13 O.W.R. 1184, cited by the Chancellor in his judgment.

In a recent case in the House of Lords, *McCartan v. Belfast Harbour Commissioners*, reported in 44 Irish Law Times 223, also in [1911] 2 I.R. 143, in speaking of the value of such cases, the Lord Chancellor said (p. 145 of the latter report): "Decisions are valuable for the purpose of ascertaining a rule of law. No doubt they are also useful as enabling us to see how eminent Judges regard facts and deal with them . . . But it is an endless and unprofitable task to compare the details of one case with the details of another, in order to establish that the conclusion from the evidence in the one must be adopted in the other also."

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That case involved a similar question, namely, which of two alleged masters was liable for the negligence of the servant of one of them to another servant engaged in the same operation. The case had been tried by a jury, and the question is referred to by more than one of the learned Judges in the House of Lords as a pure question of fact involving no legal principle.

I am afraid I must plead guilty to having spent some time in the "unprofitable task" of seeking comfort and assurance from the judgments of other learned Judges in other cases of a somewhat similar nature, with the result that I am obliged to say, after looking at a great many of them, that in no case do I find the material facts to be of such a peculiar nature as in this case. In all of them there was what there is not here, namely, a voluntary hiring, in the ordinary sense, of the negligent servant by at least one of the alleged masters, and, therefore, no difficulty in determining whose general servant he was—the difficulty occurring later on when his services had been lent or bargained for temporarily to another. And the test usually applied was, who had the power to direct or control him in the doing of the act out of which the negligence arose. See *Waldock v. Winfield*, [1901] 2 K.B. 596; *Donovan v. Laing Wharton and Down Construction Syndicate Limited*, [1893] 1 Q.B. 629; *Brady v. Chicago and Great Western R.W. Co.* (1902), 114 Fed. Repr. 100; *Brow v. Boston and Albany R.R. Co.* (1892), 157 Mass. 399.

The initial difficulty here is, to say that Leland was ever at any time, in any proper sense, the exclusive servant of the defendant the Canadian Northern Railway Company. That company, it is true, appointed him, but only under the compulsion of a statutory order. And it is also true that that company, in the first instance, paid his wages; but, in the end, they were really paid by the other company, at whose instance, and to serve whose purposes, the appointment was made. That company, it may fairly be said upon the facts, in the language of the definition of Best, C.J., was the company which expected to derive, and did derive, the chief advantage from his acts. He, in fact, did nothing for the other company but what had been rendered necessary by acceding to the request of the first-mentioned company. For months at a time, the little spur-line of the defendant the Canadian Northern Railway Company was entirely closed, at which



time, by the terms of the order, the signals and derails were so set as to admit of the trains of the other company passing without stopping, and the services of a signalman then wholly dispensed with.

Having regard to all the circumstances, I see no difficulty in construing the order under which Leland was appointed as providing, and intended to provide, for the case of a signalman who should be in charge of the crossing and should be in the service of the two companies, acting for each upon its own lines as the occasion required; and in holding that, on the occasion in question, Leland, the signalman in charge, was a person in the service of the defendant the Canadian Pacific Railway Company as employer, who had charge or control of the points and signals at the crossing in question, within the meaning of sec. 3, sub-sec. 5, of the Workmen's Compensation for Injuries Act.

Such a construction violates no rule of law, in my opinion, and is in entire accordance with the justice of the case.

I would dismiss the appeal with costs.

*Appeal allowed; GARROW, J.A., dissenting.*

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[MIDDLETON, J.]

RE MERCER.

*Surrogate Courts—Jurisdiction—Payment of Infant's Money into Court—Trustee Act, 1 Geo. V. ch. 26, sec. 37(2)—Practice.*

A Surrogate Court has no right to the custody of the property of infants or lunatics; and the Judge of a Surrogate Court has no jurisdiction to order payment of an infant's money into that Court.

Under sec. 37(2) of the Trustee Act, 1 Geo. V. ch. 26, the Judge of a Surrogate Court may order payment of an infant's money into the High Court.

Apart from want of jurisdiction, the Surrogate Courts have no machinery for the investment of money in Court; and it is not in the interests of infants that money should be so paid in.

AN appeal by the Official Guardian from an order of the Judge of the Surrogate Court of the County of Oxford, dated the 20th April, 1912, directing payment into the Surrogate Court of the moneys to which John H. Mercer, an infant, was entitled.

May 16. The appeal was heard by MIDDLETON, J., in Chambers.

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*F. W. Harcourt*, K.C., Official Guardian, appellant. The Court of Probate was established and its powers defined by 33 Geo. III. ch. 8, and abolished by 22 Vict. ch. 93. The appointment of guardians of infants' estates was provided for by 8 Geo. IV. ch. 6. The present Surrogate Courts Act is 10 Edw. VII. ch. 31; amended as to appeals by 1 Geo. V. ch. 18, sec. 2. This Act, 10 Edw. VII., confers on a Surrogate Court the same powers as had the former Court of Probate; but neither this nor any other Act empowers the Surrogate Court Judge to direct payment of infants' moneys into the Surrogate Court. The Surrogate Court, as a matter of fact, has no Accountant's office, nor is there any machinery or provision made as regards audit and other safeguards. Moreover, these moneys, if deposited in the Surrogate Court, will draw interest at the rate of three per cent. only. The High Court has an Accountant's office, with all the proper safeguards, such as audit, etc., in connection with it, and infants' moneys, when paid into the High Court, now draw interest at the rate of four and one-half per cent. The Surrogate Court Judge has power, under 1 Geo. V. ch. 26, sec. 37, to direct infants' money to be paid into the High Court.

*C. A. Moss*, for the respondent, the administrator. The Surrogate Court has always possessed power to direct money to be paid into its own custody. The statute 10 Edw. VII. ch. 31, sec. 21, gives the Surrogate Courts the same powers as the former Court of Probate for Upper Canada. This Court had the same powers as the English Courts, and they possessed plenary powers over all matters which came within their jurisdiction. The practice for years has been to pay money into the Surrogate Court. The Trustee Act, 1 Geo. V. ch. 26, sec. 37, expressly gives the Surrogate Court Judge power to order money to be paid into Court. This means the Surrogate Court—not the High Court. The order is then entered in the Chambers book at Osgoode Hall, so that there may be a record of it. The Con. Rules 1221, 1222, and 1223 can be adopted by the Surrogate Court as the procedure for payment of money into Court. It is a convenience to outside solicitors to pay money into their own Surrogate Courts, and a saving of expense to the infants.

May 18. MIDDLETON, J.:—Upon the appointment to pass the administrator's accounts it appeared that the administrator

had in his hands \$214.33 belonging to the infant; and, the administrator desiring to be discharged from his trust with respect thereto, the Surrogate Court Judge directed that the administrator do pay this sum into the Surrogate Court to the credit of the infant, less \$10 allowed for the cost of payment in; this sum to be paid out to the infant upon his attaining his majority.

This direction was made against the protest of the Official Guardian, who contended that the money should be paid into the High Court, under the provisions of the Trustee Act, 1 Geo. V. ch. 26, sec. 37, sub-sec. 2, which provides that where a Surrogate Court Judge, in passing accounts before him, finds that an executor, administrator, guardian or trustee has money or securities in his hands belonging to an infant or lunatic, he may make a "like order"—that is, an order similar to that referred to in sec. 37, sub-sec. 1, permitting the payment into the High Court of the moneys in question.

The Surrogate Court is a Court of probate only; it has no inherent jurisdiction. It is a creature of the statute; its jurisdiction and powers are found in the Surrogate Courts Act. It can grant probate, letters of administration, and letters of guardianship, and can hear and determine questions arising in all causes and matters testamentary; but neither it, nor the Court of Probate, which it succeeded, ever had the right to the custody of the property of infants or lunatics; and, although new jurisdiction has been recently conferred upon it, enabling it to pass executors' accounts and deal with certain matters ordinarily arising in administration suits, no such power as that suggested has yet been conferred.

There is not to be found in the Surrogate Rules any machinery for payment into Court. The Surrogate Court has no Accountant and no officer who is entitled to receive and hold the moneys.

I asked counsel what was meant by "paying money into the Surrogate Court;" and was told that the procedure adopted was the payment of the money into a bank. Counsel did not know whether it was paid to the credit of the person entitled, either solely or jointly with the Surrogate Court Registrar or the Surrogate Court Judge. The bank pass-book is then deposited with the Surrogate Court Registrar. Upon this deposit being made, the bank allows three per cent. interest.

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Apart from the question of the absence of jurisdiction, the practice is most inconvenient and is not in the interest of the infant. The expense of paying money into the Surrogate Court in this way is fully as great as upon payment into the High Court; and the money carries three per cent. interest, instead of four and a half per cent., as now allowed by the High Court. The funds are subject to no supervision or control. There is no audit, and no one is responsible in any way.

The appeal should be allowed, and the order varied by directing payment into the High Court. No costs.

## [IN CHAMBERS.]

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## MACMAHON V. RAILWAY PASSENGERS ASSURANCE CO.

May 6.  
May 21.

*Discovery—Examination of Party—Question as to Document not Mentioned in Affidavit on Production—Indirect Method of Cross-examination on Affidavit—Con. Rule 490.*

In an action for a death claim upon an accident insurance policy, one of the defences being misrepresentation as to age, the plaintiff, upon examination for discovery, refused to answer the question whether the marriage certificate of the deceased (which would or might, as it was admitted, assist in proving the age of the deceased) was in the possession of his solicitors. This document was not mentioned in the plaintiff's affidavit on production; and it was contended that the question was an attempt to cross-examine the plaintiff upon that affidavit:—

*Held*, that, while Con. Rule 490 prevents cross-examination on an affidavit on production, it does not prevent any examination being had or questions asked which could be had or asked otherwise than on a cross-examination on such an affidavit; and, as the document could be called for at the trial, and (apart from the question as to the affidavit) upon examination for discovery, the question should be answered.

Information which would otherwise be compellable on an examination for discovery does not become privileged if and when an affidavit on production is made, merely because the information sought would contradict the affidavit or form a basis for a motion for a better affidavit.

Review of the practice and authorities.

*Dryden v. Smith* (1897), 17 P.R. 500, and *Standard Trading Co. v. Seybold* (1902), 1 O.W.R. 650, explained and distinguished.

Order of the Master in Chambers affirmed.

MOTION by the defendants for an order requiring the plaintiff to make further discovery.

May 2. The motion was heard by Mr. James S. CARTWRIGHT, K.C., Master in Chambers.

*Shirley Denison*, K.C., for the defendants.

*H. E. Rose*, K.C., for the plaintiff.



May 6. THE MASTER:—In this action for the amount of a death claim upon an accident insurance policy, one of the defences is, that the age of the assured was incorrectly given. On examination of the plaintiff for discovery, he was interrogated on this point, and was asked to produce the marriage certificate of his mother, the assured; no such document was mentioned in the plaintiff's affidavit on production, and his counsel objected to these questions as being an attempt to cross-examine on the affidavit on production. The plaintiff did not say whether he had it or not, but stated that he was informed that the marriage took place at Belleville, Ontario, in what year he could not say. (This would seem to imply that the certificate was not in his possession.) He stated facts as to his own birth and that of his older brother which would agree with 1864 as the date of the marriage. He further stated that he had no record of his mother's age, and that all his inquiries on the point had been fruitless. He was then asked again as to the marriage certificate, and the objection of his counsel was again made and sustained by the examiner (questions 23 and 24).

The defendants now move for an order to have the questions answered, and that the plaintiff produce the marriage certificate therein referred to, and make a further affidavit on production.

It is to be observed that the plaintiff has never admitted that he had at any time any marriage certificate of his parents. It is, therefore, clear that the motion, so far as it asks for a further affidavit, is made too soon.

The first point to be decided now is, whether the plaintiff should state: (1) whether he had such certificate (question 9), though this is not material, as (question 22) he was again asked if he had the certificate, and at once answered and without objection by his counsel, "No, I have not." He was then asked (question 23), "Is it in your solicitors' possession?" This was not answered, and he was then asked (question 24), "Have you seen a marriage certificate?" This he declined to answer, on the advice of counsel, and the objection was sustained by the examiner.

Counsel for the plaintiff relied on the decision of the Divisional Court in *Standard Trading Co. v. Seybold* (1902), 1 O.W.R. 650, and especially on the words (p. 651): "The opposite party may

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not indirectly, by means of an examination for discovery, do that which he may not do directly—cross-examine upon an affidavit on production.” But this must be read with what precedes. The case is not found in the Ontario Law Reports, and the facts are not given in detail. It would seem, however, that the defendant was asked on discovery if he had executed a certain document, referred to as exhibit 6. Then the judgment proceeds: “So far from there being any admission by the defendant that he had ever had in his possession or then had such a document, according to his recollection as then stated he never signed any such document.” The next paragraph recognises admissions that he had other documents as a ground for a further affidavit; and, in my reading of this case, it only says that the usual rule as to when a further affidavit can be required is to be strictly followed, but not so as to debar the examining party from doing what was done in that case. Had the defendant admitted that he had executed exhibit 6, or had had it in his possession at any time, he might have been required to make a further affidavit.

I was always under the impression that an examination for discovery was a very usual way to obtain a further affidavit. The insufficiency of the previous affidavit is then brought to light—arising very often from oversight or forgetfulness of the deponent or from a misapprehension of himself or his solicitor as to the relevancy of documents other than those produced.

The counsel for the defendants stated that he was willing to accept the statement of the plaintiff’s solicitors as to whether there was a marriage certificate in existence, and whether the plaintiff had seen it, or had had it in his possession. This he is entitled to, on the ground that the true age of the assured is in issue, and the production of the certificate might enable the defendants to obtain conclusive evidence on this point. (See *Attorney-General v. Gaskill* (1882), 20 Ch.D. 519, 528, cited in *Bray on Discovery*, p. 112.) This is the more important as the plaintiff admits that a month before her death his mother said (question 199 *et seq.*), “I am about sixty-four.” One of the conditions of the policy is, that the assured was, on the 11th April, 1911, not sixty-two.

If the solicitors cannot give this information, there must be

further examination before trial. Success having been divided, the costs of this motion will be in the cause.

The plaintiff appealed from the order of the Master in Chambers.

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May 14. The appeal was heard by RIDDELL, J., in Chambers. *H. E. Rose*, K.C., for the plaintiff.

*Shirley Denison*, K.C., for the defendants.

May 21. RIDDELL, J.:—This is an appeal from an order of the Master in Chambers directing the plaintiff to answer certain questions which he refused to answer upon his examination for discovery.

The action is upon an accident insurance policy—one of the defences is misrepresentation as to age. Upon the examination for discovery, the plaintiff refused to say whether the marriage certificate of the deceased (which would or might, as it is admitted, assist in proving the age of the deceased) was in the possession of his solicitors.

The ground of the objection is, that the plaintiff had already made an affidavit on production in which he did not mention this document; and it is contended on his behalf that the question which he objected to answer was an indirect cross-examination upon that affidavit.

I may say at once that I cannot understand the refusal of the plaintiff or his solicitors to make full disclosure of this document if it exists—if the claim is an honest one. But that does not disentitle him to take full advantage of the law if it is as he contends.

The practice, which never obtained in England, of cross-examining on an affidavit on production was introduced into the Upper Canada Chancery practice shortly after the reorganisation of the Court of Chancery in 1849, by 12 Vict. (Can.) ch. 64. Before that time, the Court of Chancery had been as at first constituted in 1837 by 7 Wm. IV. ch. 2, with a Vice-Chancellor—but thereafter the Court was equipped with a Chancellor and two Vice-Chancellors. Before this, the English Orders passed before March, 1837—the date of the Act 7 Wm. IV. ch. 2—and a few orders passed by the Upper Canada Court of Chancery—were in

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force. In 1850 (7th May), new orders were issued by the Upper Canada Court of Chancery, amongst them No. 50: "Any party to a suit may be examined as a witness by the party adverse in point of interest . . . without any special order for that purpose . . ." This provision was continued by the Chancery General Orders of 1853, O. 22, sec. 1 (see 3 Gr. at p. 28), and became in the Chancery General Orders of 1868 Chancery General Order 138.

In 1852, this was considered to justify cross-examination on an affidavit of documents: *Nicholl v. Elliott* (1852), 3 Gr. 536, at p. 545, *per* Blake, C.: "Where the affidavit fails to furnish the discovery to which the plaintiff may be entitled, it will be competent for him, of course, to cause the defendant to be examined *viva voce* . . ."

And in 1877, under the Chancery General Orders of 1868, Spragge, C., in *Dobson v. Dobson* (1877), 7 P.R. 256, following the former case, held that an examination upon the affidavit of documents was warranted by the General Order. The Chancellor points out the danger of two examinations, one for discovery, one upon the affidavit, but says (p. 258): "The question of costs . . . the Court might deal with in the case of two examinations without any reason for it . . ."

This overruled *Paxton v. Jones* (1873), 6 P.R. 135, in which Mr. Holmsted (Referee) had held that Order 138 did not justify cross-examination on an affidavit on production, and pointed out that General Order 268 did not refer to affidavits on production: "Any person having made an affidavit to be used or which shall be used on any motion, petition, or other proceeding before the Court, shall be bound to attend for the purpose of being cross-examined . . ."—this was O. 40, sec. 7, of the Orders of 1853.

In the Rules of 1888 such a cross-examination was specially provided for. Con. Rule 512 was: "The deponent in every affidavit on production shall be subject to cross-examination;" but this was abrogated on the 23rd June, 1894, by Rule 1345, which in 1897 became Con. Rule 490: "A person who has made an affidavit to be used in any action or proceeding, other than on production of documents, may be cross-examined thereon— still in force.



No doubt, the exception of the affidavit on production from liability to question by cross-examination thereon, was due to a desire to prevent two examinations and so save costs. See the remarks of the Chancellor in *Dobson v. Dobson*, 7 P.R. at p. 258, cited above.

It never was intended to prevent any examination being had or questions asked which could be had or asked otherwise than on an examination on such an affidavit—that it prevented cross-examination on an affidavit on production is beyond question.

In *Dryden v. Smith* (1897), 17 P.R. 500, an attempt was made to get around the Rule by taking out an appointment for examination of the plaintiff upon a pending motion made by the defendant for a better affidavit on production from the plaintiff. Mr. Cartwright, sitting for the Master in Chambers, set this aside, and his judgment was affirmed on appeal by Moss, J.A. The learned Judge (now Sir Charles Moss, C.J.O.) pointed out (p. 504): "The usual practice of examining the plaintiff for discovery has not as yet been adopted in this case." And (p. 505): "This appears to me to be in substance an attempt to cross-examine the plaintiff upon his affidavit on production, under cover of a motion which, if made at all, should follow and be based upon the outcome of the means usually adopted under the Rules and practice for obtaining from a party information and discovery as to documents in his possession or power beyond that already furnished by the affidavit on production."

So far is this from deciding that the opposite party cannot obtain, by an examination for discovery, information as to documents supposed to have been left out of the affidavit—that it (as it seems to me) certainly approves of the "usual practice of examining . . . for discovery," and of an application for a better affidavit based upon the outcome of following such practice.

In *Standard Trading Co. v. Seybold*, 1 O.W.R. 650, the defendant had filed an affidavit on production sufficient in form; he was then examined for discovery and asked whether he had signed a document, exhibit 6, then produced to him. He said that, according to his recollection, he had never signed any such document. The plaintiffs then "deliberately closed their examination," and moved for an order: (1) that the defendant should file a further and better affidavit on production; and (2) that he

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should attend again for further examination. The Local Master at Ottawa refused to make the order; on appeal, the Chancellor reversed the decision and made the order asked for; the defendant then appealed to a Divisional Court, which Court allowed the appeal. The grounds—wholly sufficient grounds, as must be admitted—are these. As to making a better affidavit, the deponent did not admit that he had or ever had had the document—as to the other part of the motion, the plaintiffs had deliberately closed their case. In the report in 1 O.W.R., at p. 651, the Chief Justice of the Common Pleas, who gave the judgment of the Court, is represented as saying: “As was determined by Mr. Justice Moss in one of the cases referred to (*Dryden v. Smith*, 17 P.R. 500, 17 Occ. N. 262), the opposite party may not indirectly, by means of an examination for discovery, do that which he may not do directly—cross-examine upon an affidavit on production.” It is quite plain that this is *obiter dictum*, and not a decision—moreover, it would seem to be either a misprint or due to inadvertence: Mr. Justice Moss was not dealing with an examination for discovery at all, but an examination for use upon a motion for a better affidavit. But, whether *dictum* or decision, inadvertence or not, it is far from deciding that information which would otherwise be compellable on an examination for discovery becomes privileged if and when an affidavit on production is made, and the information sought would contradict the affidavit—or, if not contradict, form a basis for a motion for a better affidavit. It is admitted that such a document could be called for at the trial—and also (unless the affidavit on production interfered) at the examination for discovery.

I think the appeal should be dismissed with costs to the defendants in any event.

I must again express my astonishment at the attitude of the plaintiff, if his claim is honest.

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[LATCHFORD, J.]

ROBINSON V. GRAND TRUNK R.W. CO.

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June 6.

*Railway—Carriage of Live Stock and Person in Charge—Half Fare Privilege—Injury to Person—Negligence—Liability—Exemption—Contract with Shipper—Absence of Privity and Knowledge of Person Injured.*

The plaintiff was injured while travelling on a train of the defendants, by the defendants' admitted negligence. He was travelling at half fare in charge of a horse shipped by P., under a contract made between P. and the defendants, not read or signed by the plaintiff. The form of contract signed was authorised by the Board of Railway Commissioners of Canada, and provided that, "in case of the company granting to the shipper or any nominee . . . of the shipper a pass or privilege at less than full fare to ride on the train on which the property is being carried . . . as to every person so travelling on such a pass or reduced fare the company is to be entirely free from liability in respect of his death, injury, or damage, and whether it be caused by the negligence of the company, or its servants or employees, or otherwise howsoever:"—*Held*, that the plaintiff was not bound by the contract; and was entitled to recover in an action for damages for the defendants' negligence. *Bicknell v. Grand Trunk R.W. Co.* (1899), 26 A.R. 431, and *Sutherland v. Grand Trunk R.W. Co.* (1909), 18 O.L.R. 139, distinguished. *Dicta of MEREDITH, J.A., in Goldstein v. Canadian Pacific R.W. Co. and Robinson v. Canadian Pacific R.W. Co.* (1911), 23 O.L.R. 536, 542, 543, not followed.

ACTION for damages for injury sustained by the plaintiff by reason of the defendants' negligence, in the circumstances mentioned below.

May 6. The action was tried before LATCHFORD, J., with a jury, at Parry Sound.

*W. L. Haight*, for the plaintiff.

*D. L. McCarthy, K.C., and W. E. Foster*, for the defendants.

June 6. LATCHFORD, J.:—That the defendants caused injury to the plaintiff by their negligence was formally admitted at the trial, where the damages which the plaintiff thus sustained were fixed by a jury at \$3,000.

It is, however, contended on behalf of the defendants that they are relieved from liability by the terms of a contract made between them and one Dr. Parker, who shipped a horse in charge of the plaintiff from Milverton, in the county of Perth, to South River, in the district of Parry Sound. Dr. Parker had purchased the horse for his friend, Dr. McCombe, of South River; and, at the latter's request, the plaintiff proceeded to

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Milverton to bring up the horse; the rules of the defendants requiring that live stock shipped more than a hundred miles should have a man in charge.

The plaintiff accompanied Dr. Parker to the railway station, and was present when the shipping bill and special contract upon which the defendants rely was signed by the defendants' agent and by Dr. Parker, who thereupon, at the instance of the agent, handed it, folded, to the plaintiff. In the margin of the contract is written, "Pass man in charge at half fare." The plaintiff did not open or read the contract. Its purport was not made known to him by any one, nor was he required by the agent (as the form directs) to write his name upon it. He paid no fare, and was asked for none. Half fare for him was, however charged in the bill rendered to Dr. McCombe at South River for the carriage of the horse, and both charges were paid by Dr. McCombe. During the transit, a rear-end collision negligently occurred at Burk's Falls, and the plaintiff sustained serious injury.

The contract under which the horse was carried was before the Board of Railway Commissioners of Canada for approval, on the 17th October, 1904, upon the application of the three great railway systems of the Dominion and of the Pere Marquette Railroad Company. An order was thereupon made, which, after referring to the matter as one of great importance, "requiring that much circumspection should be exercised in examining into the forms which the Board hereafter has to approve and also into the question of limitation of liability on the part of the carriers," empowered and authorised the applicants to use the forms submitted "until the Board shall hereafter otherwise order and determine."

The form signed by Dr. Parker is identical with that then temporarily authorised by the Railway Commissioners; and, though nearly eight years have elapsed, no further or other order has been made in a matter so seriously affecting the relations between the principal railways of the country and the shippers of live stock. The important provision is as follows:—

"In case of the company granting to the shipper or any nominee or nominees of the shipper a pass or a privilege at less



than full fare to ride on the train in which the property is being carried, for the purpose of taking care of the same while in transit and at the owner's risk as aforesaid, then as to every person so travelling on such a pass or reduced fare the company is to be entirely free from liability in respect of his death, injury or damage, and whether it be caused by the negligence of the company, or its servants or employees, or otherwise howsoever."

In view of the decisions of *Bicknell v. Grand Trunk R.W. Co.* (1899), 26 A.R. 431, and *Sutherland v. Grand Trunk R.W. Co.* (1909), 18 O.L.R. 139, it cannot be doubted that the contract was binding upon Dr. Parker. That point, however, is not involved in the present case. Here the question is this: Is the plaintiff bound by a contract made between the shipper and the carrier to which the plaintiff was not a party and of the terms of which he had no knowledge? I have been referred to no case which decides this affirmatively.

In *Goldstein v. Canadian Pacific R.W. Co.* and *Robinson v. Canadian Pacific R.W. Co.* (1911), 23 O.L.R. 536, the carriers appear to have recognised their liability for negligence causing damage to persons accompanying live stock under a contract identical with that made between Dr. Parker and the defendants. The contract bore the same "note" as here; and in both cases, as here, the men accompanying the stock were not required to sign or endorse the contract. Unlike the present case, the relation of master and servant—if that is at all material—existed between the shippers and the men accompanying the stock. The question before the Court for decision was the right of the carrier to recover from the shippers the amounts paid by the railway company to Robinson, who was injured, and to the personal representatives of Goldstein, who was killed. Garrow, J.A., in his judgment (p. 540) says: "No trial having taken place, it is now quite impossible accurately to ascertain what the defendants feared, or exactly why they settled; the only really material fact appearing, so far as the third parties (the shippers) are concerned, being that, before doing so, the defendants took the precaution of obtaining from them the undertaking not to dispute the liability of the defendants to the plaintiffs, or the amounts at which it was proposed to settle."

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The learned Judge then proceeds to say that the question before the Court was merely the right of the defendants to indemnity for the amounts so paid; and, applying the rule that generally the right to indemnity, unless expressly contracted for, must be based upon a previous request, express or implied, to do the act in respect of which indemnity is claimed, the learned Judge held that, in the circumstances, there was no express covenant or contract of indemnity, and that it would be impossible in law to imply one. The case against the third parties was, therefore, dismissed.

In my opinion, I am not bound by the opinions expressed by Meredith, J.A., in his judgment (pp. 542 and 543) as to the right or absence of right on the part of those injured by the carriers, arising out of the contract made between the shippers and the railway company. These opinions are, I think, mere *dicta*, not necessary to the determination of the question of indemnity which was before the Court.

I am firmly of the opinion that Robinson's common law rights against the defendants were not taken away by the contract made between the defendants and Dr. Parker. Any other view appears to me necessarily to imply that, by a contract to which he was not a party, under which he derived no benefit—the reduction in fare benefiting only the consignee—and of whose terms he had neither notice nor knowledge, his right to be carried without negligence on the part of the defendants was extinguished, and they were empowered, without incurring civil liability, to maim and almost kill him while he was lawfully upon their train. If such can possibly be the effect of the special contract, a higher Court must so decide.

I direct that judgment be entered for the plaintiff for \$3,000 and costs.

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[MIDDLETON, J.]

## WOOD V. GRAND VALLEY R.W. CO.

1912

June 7.

*Contract—Subscription for Bonds of Railway Company—Undertaking to Construct Branch Line—Signature to Agreement—Liability of Company—Personal Liability of President—Money Paid on Faith of Undertaking—Breach—Failure of Consideration—Non-performance of Promise—Damages—Assessment of—Allowance for Bonds.*

The plaintiffs, who were merchants and manufacturers carrying on business in a village, were induced by the defendant P., the president of the defendant railway company, to give financial assistance to the company, by the purchase of bonds to be issued by the company to aid in the construction of a branch line which would give the village an advantageous railway connection. The bonds were not regarded as being of any great value; what the plaintiffs desired, and what P. promised, was the construction of the line:—

*Held*, upon the evidence, that it was the intention of P. and the plaintiffs that P. should be personally bound; and that it was upon the faith of P.'s personal promise that the plaintiffs agreed to purchase the bonds. A document embodying the arrangement made was drawn up and signed thus, "The Grand Valley Railway Company, A. J. Pattison, President," and was not otherwise signed by P.:—

*Held*, that the signature was intended to be the signature of the company by P., its president; but, by the terms of the agreement actually made, and also by the document embodying the agreement, P. was intended to be personally bound; and the absence of his signature was not fatal.

*Held*, therefore, that both P. and the company were bound.

Upon the faith of the agreement, the plaintiffs and others subscribed for \$10,000 worth of bonds, and executed a joint promissory note for that amount. The note was discounted; the proceeds went to the credit of the company; and the bonds were allotted and distributed. The plaintiffs paid the note, and became entitled to the whole \$10,000 worth of bonds. The company did not construct the branch line; and the plaintiffs brought this action to recover the \$10,000, or for damages for breach of contract:—

*Held*, that the plaintiffs were not entitled to recover the \$10,000 as upon a failure of consideration, on their undertaking to return the bonds: for, although the bonds were not of great value, they formed part of the consideration; and money will not be ordered to be refunded, as upon failure of consideration, where the failure is the non-performance of a promise.

*Held*, however, that the plaintiffs were entitled to damages for the non-performance of the promise of P. and the company to construct the line; and those damages should, having regard to all the circumstances, be fixed at \$10,000; subject to a provision in ease of P. in regard to the bonds held by the plaintiffs.

ACTION by a number of manufacturers and merchants, carrying on business at the village of St. George, against the railway company and A. J. Pattison, formerly president of the railway company, to recover damages from the defendants for breach of contract to construct an addition to their line of railway so as to connect the village of St. George with the Canadian Pacific

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Railway at Galt; for repayment of \$10,000 paid by the plaintiffs for bonds of the railway company; and for other relief.

May 28. The action was tried by MIDDLETON, J., without a jury, at Brantford.

*G. F. Shepley*, K.C., and *A. M. Harley*, for the plaintiffs.

*S. C. Smoke*, K.C., for the defendant company.

*C. J. Holman*, K.C., for the defendant Pattison.

June 7. MIDDLETON, J.:—The plaintiffs are a number of merchants and manufacturers carrying on business at St. George, a village situated about half way between Brantford and Galt. At the time of the occurrences giving rise to this action, and down to the present time, the village of St. George was somewhat unfavourably located from the standpoint of the manufacturer. The Grand Trunk Railway has a station named St. George, but it is between one and two miles from the village, and no accommodation is afforded to industries by any spur line or industrial sidings or switches. The Grand Valley Railway, running from Brantford to Galt, follows a semi-circular route along the valley of the Grand River, passing some six miles south of St. George. A branch line runs northward at Blue Lake, some two miles, terminating four miles south of the village.

In 1906, Mr. Pattison was the president of the Grand Valley Railway Company, its largest individual stockholder, and very much interested in the success of the undertaking. He conceived the idea that a continuation of the road from Blue Lake to St. George would not only be of great advantage to the industries of that village, but that the interests of his road would be substantially advanced, as a very considerable amount of freight might be diverted from the Grand Trunk by affording convenient access to the different industries, and the freight could then be carried to Galt, where transshipping arrangements might be made with the Canadian Pacific Railway Company.

With this in view, he visited St. George, and convened a public meeting of those most likely to be interested in the proposed arrangement; and, after explaining what was proposed, he solicited financial assistance, to take the shape of the purchase



of bonds that would be issued by the railway company to aid in the construction of the four miles necessary for this new undertaking.

Like all promoters, Mr. Pattison was sanguine, and he seems to have imparted some of his enthusiasm to the plaintiffs. The Grand Valley Railway Company was well-known; its financial position was not regarded as satisfactory; and, before parting with their money, the plaintiffs insisted on Mr. Pattison shewing his faith in the company under his control by himself undertaking to be responsible for the carrying out of the promises he was ready to make on its behalf.

There is a conflict of evidence as to Mr. Pattison's attitude. His recollection is, that he was to undertake nothing save in his representative capacity; but I think his recollection is at fault, and that it was his intention, as well as the intention of the plaintiffs, that he should be personally bound.

Upon the faith of Mr. Pattison's personal guarantee, the plaintiffs agreed to purchase bonds of the road to the extent of \$10,000. These bonds were not regarded as being of any great value, and were not sought as an investment. What the plaintiffs desired, and what Mr. Pattison promised—both in his own name and in the name of the railway company—was the construction of the line which would give them a means of handling freight independently of the Grand Trunk; the accommodation afforded by that company being, as already said, regarded as quite inadequate and unsatisfactory.

Mr. Pattison undertook to reduce the arrangement to writing, and he prepared a short memorandum—produced at the trial as exhibit No. 2—under date of the 6th June. This stated that the subscription of Mr. ————— for ————— bonds is received subject to the establishment of freight connection with the Canadian Pacific Railway at Galt, and is to be cancelled if freight connection and satisfactory tariff rates are not arranged. This memorandum was signed by the Grand Valley Railway Company, and was to be delivered to each individual subscriber whose subscription would form part of the \$10,000.

When this document was submitted as embodying the arrangement made, it was at once repudiated. Mr. Pattison's

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attitude then was: "If you do not like the draft that I propose, prepare one to suit yourselves." Mr. Wood was selected as the draftsman, and prepared the document exhibit No. 3. This was afterwards read over by all concerned, was deemed to be satisfactory, and was executed by Mr. Pattison, who signs thus: "The Grand Valley Railway Company, A. J. Pattison, President."

Upon the faith of this document (dated the 29th June, 1906), individual subscriptions for bonds—some of which bear an earlier date, but were until then held in escrow—were handed over, and new subscriptions were made for an amount necessary to cover the shortage, so that the total would reach the required \$10,000. A joint note was executed by the subscribers and discounted; the proceeds went to the credit of the railway company; and the bonds were allotted and distributed. Some of the signatories to this note ultimately proved unable to pay. The plaintiffs paid the whole note, and between them became entitled to the whole \$10,000 of bonds.

The company readily assimilated the \$10,000, but did not make any serious endeavour to construct the four miles of road: merely grading a short distance.

At one stage of the trial, some difficulty was suggested by reason of the bonds having been transferred by the Northern Securities Limited; but Mr. Pattison made it quite plain that the bonds were the bonds of the railway company, although held by the Northern Securities Limited, a concern of which he was also president.

Upon the pleadings, the company disputed all liability for the transaction; but, when it was made to appear that the money had gone to the company, and when Mr. Pattison stated that all he had done was done with the sanction not only of the entire directorate, but with the sanction and approval of all the shareholders of the company, Mr. Smoke admitted that the company was not in a position to repudiate the transaction.

The question of difficulty is, whether, on the agreement of the 29th June, Mr. Pattison assumed any personal liability.

In the first place, much reliance is placed upon the fact that Mr. Pattison did not sign this document individually; he signed it merely as president of the railway company.

I quite agree with Mr. Shepley that the addition of the word "president" would not derogate from Mr. Pattison's personal liability if the signature had been simply "A. J. Pattison, President;" but I cannot follow him when he contends that the signature in question is Mr. Pattison's signature. I think it was intended to be the signature of the railway company by Pattison, its president.

Nevertheless, I think that, by the terms of the agreement, Mr. Pattison was intended to be personally bound; and the absence of his signature is not fatal. The writing was intended to embody in a permanent record the terms of an agreement already made. It does not itself constitute the agreement; and, as I understand the transaction, the agreement was one which it was quite competent for the parties to make without any written instrument.

Yet I think it important to investigate the terms of the written agreement, because, no doubt, all concerned regarded it as embodying the agreement which had already been made. Looking, then, at the agreement for the purpose of ascertaining Mr. Pattison's liability, and for this purpose disregarding all other evidence, I think I find conclusive proof of his personal liability.

"Mr. A. J. Pattison, president of the Grand Valley Railway Company, hereby undertakes and agrees, on his own behalf and on behalf of the Grand Valley Railway Company, that he will make or cause to be made a through traffic arrangement with the C.P.R., making direct connection with the C.P.R. at Galt, in terms of the Railway Act of Canada, in such a way that current competitive freight rates will apply continuously from St. George," etc.

The addition to Mr. Pattison's name of his description, "president of the Grand Valley Railway Company," does not, as already said, detract from his individual liability. Then the agreement proceeds: "It is further agreed that the extension of the Grand Valley Railway to St. George," etc., "will be proceeded with at once." And this is followed by a proviso: "Provided always that the terms, conditions, and covenants of this agreement shall be binding upon the heirs, executors, and assigns

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of the said Pattison and the said Grand Valley Railway Company."

I am inclined to think that the draftsman of this agreement at first intended it to be an agreement entirely between Pattison and the plaintiffs, and that it was an afterthought which induced him to add "and the said Grand Valley Railway Company." If this is so, then the words "It is further agreed" must be translated "It is agreed between Pattison and the subscribers for bonds."

Upon the argument it was pointed out that the document was on its face defective, in that, while "parties" are spoken of, there are no parties. However, viewed not as an agreement but merely as a record of the agreement, I think it goes far to corroborate the plaintiffs' version of what the real agreement was.

Therefore, both on the document and on the oral evidence, I find this issue in favour of the plaintiffs.

Mr. Pattison, some time after the making of this agreement, appears to have sold his interest in the railway to a third party, who undertook to assume and carry out the contracts entered into. Some dispute has arisen between Pattison and his vendee, and the vendee now refuses to carry out the bargain. Mr. Pattison relies upon this as a moral justification for his position, thinking that the contract was one which ran with the office of president.

I cannot at all agree with him in this. His railway company received the \$10,000, and in selling out he, no doubt, obtained a correspondingly increased price; so that, if he is now called on to make good his undertaking, he ought not to complain.

At the trial it was agreed that the question of damages should be dealt with upon a reference, if I should be of opinion that the plaintiffs were entitled to recover. Subsequently both counsel have spoken to me and have agreed that I should myself assess the damages upon the evidence before me.

The plaintiffs' counsel contended that I should give judgment for recovery of the \$10,000, upon the theory that there had been a failure of consideration; the plaintiffs undertaking to return the worthless bonds of the railway company. No case was cited that appears to me to justify the granting of this relief.



I do not think the consideration can be said to have failed: for two reasons. In the first place, the plaintiffs have the bonds; and, although the bonds may not be of great value, they undoubtedly formed part of the consideration. In the second place, I find no case in which money has been ordered to be refunded, as upon failure of consideration, where the failure is the non-performance of a promise. The \$10,000 was given by the plaintiffs for the bonds of the railway company, and for the promise of the railway company and of Pattison to secure the construction of the road. This promise has not been performed, and the only remedy is damages for its breach.

Particulars were given of the damages which the plaintiffs thought they were entitled to recover, upon an entirely erroneous theory. The true principle is found in the case of *Chaplin v. Hicks*, [1911] 2 K.B. 786, where the Court of Appeal entirely repudiated the idea that substantial damages should not be awarded where there is difficulty in the assessment. I need not here quote what is there set forth at length.

In this case the plaintiffs expected to receive great benefit if they could secure the construction of the railway and competition between the Grand Trunk and the Canadian Pacific. In addition, they expected great convenience in the carrying on of their business, by the ready access to a railway by which incoming and outgoing freight could be handled. They expected additional profit by the increased prosperity of the municipality in which they were interested. All these considerations were present to the minds of both parties at the time of the making of the agreement.

There were many elements of uncertainty. These could not be eliminated. If all that was hoped for came to pass, the advantage to the plaintiffs would far exceed the \$10,000 paid. The price was not given for a thing certain, but was given for the chance of obtaining the great advantage hoped for. If I were to attempt to assess damages on the basis of the plaintiffs receiving all that they contemplated, then the damages would be many times the price paid. But, endeavouring to assess in the light of all the uncertainties and contingencies pointed out by counsel, and which were, no doubt, equally present to the minds of both

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parties at the time the agreement was made, I think I shall not go far wrong if I place the damages at the same sum as that which Pattison and his railway company induced the plaintiffs to give for this chance.

The plaintiffs profess to regard the bonds as of no value; and, while I am not allowing this to influence me in the assessment of damages, I think it is fair that any value there may be in them should go in ease of Pattison, if he is called upon to pay; and, if the plaintiffs assent, I shall direct that, upon payment of the judgment, the bonds shall be delivered to Pattison or whom he may appoint, and that any money which may be received on account of the bonds, in an action brought by other bondholders and now pending, for the realisation of the total issue, \$450,000, shall be credited upon the judgment.

The judgment will, therefore, be for \$10,000 and costs, subject to the provision above indicated.

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June 7.

*Equitable Mortgage—Deposit of Title Deed and Insurance Policies as Security for a Debt—Legal Estate not in Depositor—Assignee for Benefit of Creditors—Costs.*

The intent to create an equitable mortgage by delivery or deposit of writings may be established by parol evidence; and it is sufficient if only some or one of the material documents of title be so delivered.

The law in respect of such mortgages is the same in Ontario as in England.

An equitable mortgage may be created by the deposit of a deed, where the legal title is outstanding in another than the depositor of the deed.

Summary of the cases.

On conflicting evidence, it was *held*, that M. agreed to deliver to the plaintiffs a deed to him of a farm and certain insurance policies, as security for a debt, and did so deliver them.

Although, in the circumstances of the case, the assignee for the benefit of creditors of M. was justified in disputing the claim of the plaintiffs to establish their mortgage, that did not disentitle the plaintiffs to costs.

ACTION by creditors of one Miller against Miller's assignee for the benefit of creditors to obtain payment of their debt and a declaration that they were equitable mortgagees of Miller's lands.

June 5. The action was tried before RIDDELL, J., without a jury, at Woodstock.

*P. McDonald*, for the plaintiffs.

*S. G. McKay*, K.C., for the defendant.

June 7. RIDDELL, J.:—The plaintiffs are dealers in builders' supplies; they had supplied one Miller with certain material and had built a house for him. In June, 1910, they got from him a note at one month for \$382.50 for his account: when this note became overdue, they pressed for payment—Miller was unable to pay, and the plaintiffs pressed for security. Finding that, although the debtor had not paid for his farm in full, but had given a mortgage to the vendor for a large part of the purchase-price, nevertheless the vendor had given him a deed of the farm, the plaintiffs demanded the delivery to them of the deed as security for the debt—and, for fear of fire, they also demanded the insurance policies on the building. On conflicting evidence, I find as a fact that it was agreed that Miller should deliver to the plaintiffs the deed and the insurance policies as security for the said debt; and that he did so deliver the said documents. The debt remained unpaid; and, in February, 1912, Miller made an assignment for the benefit of his creditors to the defendant Sproat. The plaintiffs claimed an equitable mortgage upon the land; this the assignee disputed; and it was agreed that the assignee should sell the land and hold the money subject to the decision of the disputed claim. The land was sold; the assignee holds the money; the plaintiffs claim payment of their debt, and a declaration that they are equitable mortgagees.

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While, by reason of the Registry Acts in force in our Province from an early date, the doctrine of equitable mortgages of this character is foreign to our ordinary ideas, there can be no doubt that our law is the same as the English in respect of such mortgages. The kind of equitable mortgage now under consideration is that which is spoken of by Fisher in his *Law of Mortgage*, 6th ed., sec. 27: "By an extraordinary stretch of power, Courts of Equity have held (and it is now firmly established) that notwithstanding the provisions of the Statute of Frauds an equitable mortgage may be created by the delivery to the creditor or his agent, of deeds . . . or other documents of title, with intent to create a security thereon, without any written evidence of such intent." The first reported case seems to be *Russel v. Russel* (1783), 1 Bro. C.C. 269. The doctrine has been often regretted—*e.g.*, by Lord Eldon—but it is too firmly established to be altered except by legislation.

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The intent to create an equitable mortgage by delivery or deposit of writings may be established by parol evidence alone: *Russel v. Russel*, 1 Bro. C.C. 269; *Ex p. Kensington* (1813), 2 Ves. & B. 79; *Ex p. Haigh* (1805), 11 Ves. 403; *Ex p. Mountfort* (1808), 14 Ves. 606. And it is sufficient if only some or one of the material documents of title be so delivered: *Ex p. Arkwright* (1843), 3 Mont. D. & DeG. 129; *Lacon v. Allen* (1856), 3 Drew. 579.

Nothing will be found in the Ontario cases at all differing from the English cases. The expression "equitable mortgage" is used in other senses than that we have been considering, in some cases.

In *Dennistoun v. Fyfe* (1865), 11 Gr. 372, the equitable owner of property executed a mortgage—quite a different kind of "equitable mortgage." In *Jones v. Bank of Upper Canada* (1866), 12 Gr. 429, a debtor deposited two mortgages as collateral security—this further appears in (1867), 13 Gr. 74; and the Court declared the creditor "entitled, by virtue of the deposit of the mortgage, to an equitable lien or mortgage upon the hereditaments therein mentioned, for securing the moneys . . . : " 13 Gr. at p. 78. In *Aikins v. Blain* (1867), 13 Gr. 646, the mortgagor of certain lands mortgaged his equity of redemption, and this second mortgage is called an "equitable mortgage." But in *Royal Canadian Bank v. Cummer* (1869), 15 Gr. 627, the debtor created a mortgage in favour of the bank by deposit of title deeds; and in *Masuret v. Mitchell* (1879), 26 Gr. 435, Mrs. M. advanced a sum of \$1,000, and certain title deeds were deposited with her to secure this debt—the debtor "created an equitable mortgage upon the land by deposit of the title deeds:" p. 437.

Our law being the same as that in England, I reserved judgment upon one point only of those urged. Counsel for the defendants argued that an equitable mortgage cannot be created by the deposit of a deed, where the legal title is outstanding in another than the depositor of the deed.

I find, however, no trace of any such doctrine, in text-book or case.



On the contrary, in *Ex p. Glyn* (1840), 1 Mont. D. & DeG. 25, an equitable mortgage was held to cover land which had already been mortgaged to another. See especially at p. 38, *per* Sir George Rose. Here, indeed, the mortgage was not created by deposit but by agreement; but in *Ex p. Bisdee, In re Baker* (1840), 1 Mont. D. & DeG. 333, the purchaser of an equity of redemption subject to a mortgage deposited his title deed as a security—and it was not doubted that he thereby created an effective equitable mortgage.

In *Lacon v. Allen* (1856), 3 Drew. 579, C. mortgaged to A. and U. and gave them up his deed—then he deposited with L. and Y. documents relating to his title, as security for a debt. This was held a good equitable mortgage. And in *Goodwin v. Waghorn* (1835), 4 L.J. N.S. Ch. 172, a deposit even of a map and receipt for purchase-money (the purchaser having no deed) was held a good equitable mortgage. See also *Simmons v. Montague*, [1909] 1 I.R. 87.

I do not think the objection well founded.

The plaintiffs will have judgment with costs.

In view of the statements under oath of Miller, the assignee was justified in disputing the claim of the plaintiffs—but that does not disentitle them to costs.

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[MIDDLETON, J.]

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*Infant—Bank Deposit—Withdrawal by Cheque in Favour of Another—Obligation of Bank—Interest of Infant—Bills of Exchange Act, sec. 48—Liability of Bank for Amount beyond \$500—Bank Act, sec. 95—Construction and Application—"Law of the Province"—Delay in Bringing Action after Majority—Mistake as to Age—Absence of Knowledge by Bank of Infancy.*

June 8.

A cheque drawn by an infant upon a bank entitles the holder to receive payment, and so constitutes a discharge. An infant cannot claim again money paid out to him or another on his cheque.

Where an infant deposits money in a bank, the bank's obligation is to hand back the money to the infant or pay it to his order. Nothing in this is detrimental in any way to the interest of the infant.

Apart from the general law as to infants' contracts, under sec. 48 of the Bills of Exchange Act (made applicable to cheques by sec. 165), a cheque drawn by an infant entitles the holder to receive payment thereof; and the payment operates to discharge the bank.

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Section 95 of the Bank Act imposes no restriction upon repayment by the bank of a deposit in excess of \$500 made by an infant. The restriction is upon the amount of deposit; and if, as a matter of policy, the Legislature requires an infant's account to be kept under \$500, and the bank, in ignorance of the fact that the depositor is an infant, receives a sum in excess of \$500, it becomes the bank's duty, on learning of his minority, to repay the excess to the infant. Section 95 affords no sanction for the argument that, because \$1,800 was unlawfully received by the bank from the infant, and paid out on the infant's order, the infant was entitled to demand payment of \$1,300, the disability having ceased. And, at any rate, sec. 95 is not applicable, because there is no "law of the Province" which prevents an infant from depositing money in and withdrawing it from the bank, even assuming that the expression "law of the Province" is not to be confined to an express statutory provision.

The plaintiff in this case, suing the bank for part of the money which it had paid out upon his order, should have come to the Court promptly after his disability ceased; a delay of a year and a half after majority was fatal to his claim; and it was no excuse that he had been misled by his mother as to the date of his birth.

Upon the evidence, the bank acted honestly, without any knowledge of the plaintiff's infancy, and there was nothing in his appearance to indicate infancy or to provoke inquiry.

ACTION brought by one John W. Freeman to recover from the defendants the sum of \$1,300, being a portion of a sum of \$1,800 deposited by the plaintiff to his credit in the defendants' branch bank at Deseronto, and withdrawn by him from the bank during his infancy.

June 3. The action was tried by MIDDLETON, J., without a jury, at Napanee.

*W. G. Wilson*, for the plaintiff.

*W. B. Northrup*, K.C., for the defendants.

June 8. MIDDLETON, J.:—The sum of \$1,020.42 was deposited on the 8th September, 1905. This sum was the share of the plaintiff in the estate of his deceased grandfather. His father, John Freeman, was executor of the estate; and, upon realisation, paid this money to the plaintiff, who thereupon deposited it in the bank to his own credit. The sum of \$774.76 was deposited in the bank on the 15th September, 1905, and was the amount of money standing to the plaintiff's credit in the post office savings bank, and withdrawn by him from that bank, in the name of John Freeman. This amount represented \$100, the proceeds of the sale of certain sheep given to the plaintiff by his grandfather, with whom he at one time resided, and moneys saved by the plaintiff from wages paid to him by his father.

The plaintiff's father was at one time supposed to be a successful business man. He carried on business first as a grocer in Deseronto and later as an hotel-keeper. The plaintiff entered his father's employment when about twelve years of age, and assisted first in the grocery business and afterwards as bartender. He lived at home, was charged nothing for his board or lodging, and received wages, a substantial portion of which went into the post office savings bank, and then into the defendants' bank.

The hotel premises were at that time under mortgage to one John McCullough. In April, 1906, an agreement was come to between the plaintiff and his father by which the plaintiff agreed to lend his father \$1,800, to be paid on account of the mortgage upon the hotel; and on the 20th April, 1906, the plaintiff signed a cheque in favour of McCullough for this amount. This cheque was afterwards deposited to the credit of McCullough in the defendant bank, and in due course was paid out upon McCullough's cheque.

The father continued to carry on the hotel business until shortly before the 22nd August, 1910, when he left Ontario on account of domestic and financial trouble. Almost immediately after his departure, the plaintiff consulted his present solicitor, who on the 22nd August, 1910, wrote a letter to the bank demanding payment of \$1,300 and interest, upon the theory that the receipt of the \$1,800 from a minor was a breach of the Bank Act, and that the payment to the minor of anything over \$500 was void against the plaintiff, who, by reason of his minority, claimed to avoid the contract. Without waiting for a reply, the solicitors issued the writ in this action on the 23rd August.

The plaintiff was born on the 23rd December, 1887, and so came of age on the 23rd December, 1908; more than a year and a half before the bringing of this action. He asserts that he understood until recently that he was born on the 23rd December, 1888, and so would not be of age until the 23rd December, 1909—a little over six months before the bringing of the action. He does not say that his conduct with reference to the bank and his attempt to repudiate were in any way influenced by this misunderstanding; but he does rely upon his mistake as an answer

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to the suggestion that his laches should be treated as precluding him from now repudiating what he did in his minority.

About the time the father left Ontario, the mortgage upon the property was foreclosed, and the whereabouts of the father was not for some time ascertained. It is admitted that he is now absolutely worthless.

In Grant's Treatise on the Law relating to Bankers, 6th ed. (1910), p. 31, it is said: "The relations between a bank and an infant customer have not yet been the subject of judicial decision, and involve questions of great nicety." After the examination of some authorities, he concludes thus: "It is, therefore, submitted that the law is that if an infant draws a cheque in his own favour, and receives the money, the banker could clearly not be called upon to pay the infant the money a second time. As regards cheques in favour of third parties, the true relation seems to be based on the principle that an infant may do by an agent any act that he can legally do himself."

In Sir John R. Paget's article on Bankers and Banking, in Halsbury's Laws of England, vol. 1, p. 587, it is stated: "A current account may be opened with an infant, so long as it is not allowed to be overdrawn; for an infant may be a creditor. A cheque drawn by an infant entitles the holder to receive payment, and so constitutes a discharge. An infant cannot claim again money paid out to him or others on his cheques."

These expressions of opinion are based upon such statements as that of Pearson, J., in *Burnaby v. Equitable Reversionary Interest Society* (1885), 28 Ch.D. 416, 424, where he says: "The disability of infancy goes no farther than is necessary for the protection of the infant." And that of Lord Mansfield in *Earl v. Buckinghamshire v. Drury* (1761), 2 Eden 60, 71: "Infancy never authorises fraud . . . If an infant . . . receives rents, he cannot demand them again when of age." And that of James, L.J., in *Ex p. Brocklebank* (1877), 6 Ch.D. 358, 359: "Cannot an infant give a receipt for wages or salary due to him in respect of his personal labour?"

These statements, it is true, are *dicta*; but they are *dicta* of great weight, and are quite in accord with the general principles governing infants.



In *Overton v. Banister* (1844), 3 Hare 503, an infant nineteen years of age had executed a release. This was held to be a good discharge to the trustee for the sum actually paid, but not to be a bar to a suit to recover a further sum alleged to be due.

In *Valentini v. Canali* (1889), 24 Q.B.D. 166, Lord Coleridge, C.J.—with whose judgment Bowen, L.J., concurred—in dismissing an action brought by an infant to recover moneys paid by way of rent for a furnished house which he had used and occupied, stated that the infant's claim "would involve a violation of natural justice. When an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover back the money which he has paid."

It is clear that, when the bank became indebted to the infant Freeman with respect to his deposit, the mere fact of his infancy would have been no answer to an action brought by him to recover the money. As put by James, L.J., in the case already referred to, 6 Ch.D. at p. 360: "A man cannot be allowed to escape from the payment of a debt because the person to whom it is due happens to be an infant. He cannot be permitted to say, 'I will cheat my creditor because he is an infant.'"

It is a mere accident that, by the Rules of Practice, in an action for the recovery of a debt due to an infant, the judgment would require the money to be paid into Court for his benefit. That provision does not in any way alter the effect of the contract to repay implied upon the making of the deposit.

The contract was one beneficial to the infant. He was the custodian of his own money, and the agreement merely made the bank a temporary custodian of his funds during his will. The bank's obligation was to hand back the money to its customer or pay it to his order. Nothing in this was detrimental in any way to the interest of the infant.

But, apart from this, I think that the provisions of sec. 48 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, afford a complete defence, although this operation of the section may not have been foreseen by the draftsman of the Act. Section 47 provides that "capacity to incur liability as a party to a bill is

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coextensive with capacity to contract." But sec. 48 provides that "where a bill is drawn or endorsed by an infant . . . the drawing or endorsement entitles the holder to receive payment of the bill . . ."

This provision applies to a cheque (sec. 165): and, substituting the word "cheque" for "bill," the effect is: "A cheque drawn by an infant entitles the holder to receive payment thereof." If McCullough was entitled to receive payment, then the payment must operate to discharge the bank.

The plaintiff's counsel based his argument to a great extent upon the provisions of sec. 95 of the Bank Act, R.S.C. 1906, ch. 29: and I have postponed its consideration because it can better be dealt with in the light of the law relating to infants' contracts. That section provides: "The bank may . . . (a) receive deposits from any person whomsoever . . . whether such person is qualified by law to enter into ordinary contracts or not; and, (b) from time to time repay any or all of the principal thereof, . . . 3. If the person making any such deposit could not, under the law of the Province where the deposit is made, deposit and withdraw money in or from the bank without this section, the total amount to be received from such person on deposit shall not, at any time, exceed the sum of five hundred dollars."

So far as I know, no case has arisen under this section. The plaintiff's counsel assumes that the effect of it is to make not only the receipt from but the repayment to an infant of any sum exceeding \$500 unlawful; and from this he argues that because \$1,800 was received unlawfully, and \$500 only could be paid lawfully, he is now entitled to demand payment of \$1,300, the disability having ceased.

In the first place, it is to be observed that there is no restriction upon repayment. The restriction is upon the amount of deposit; and if, as a matter of policy, the Legislature requires an infant's account to be kept under \$500, and the bank, in ignorance of the fact that the depositor is an infant, receives a sum exceeding this limitation, it then becomes the bank's duty immediately to repay the excess to the infant, on learning of his

minority. I cannot find in this section any sanction for the theory upon which the action is brought.

But, as said, I do not think that there is any "law of the Province" which prevents an infant from depositing money in and withdrawing it from the bank, even assuming that the expression "law of the Province" is not to be confined to an express statutory provision.

If an infant cannot deposit money in and withdraw it from a bank, possibly he would be unable to deposit his money with an innkeeper for safe-keeping; or, if he did deposit it, according to the plaintiff's theory the only safe course for the innkeeper would be to wait till suit and then to pay the money into Court.

Upon another ground, I think, the plaintiff fails. The action is not brought until more than a year and a half after the infant attained his majority. The money withdrawn from the bank was used by him for his father's benefit, and applied in reduction of the mortgage on the father's hotel. Before making any claim, he waited until the mortgage on the hotel had been foreclosed and the father had absconded. If he intended to repudiate what he had done during his minority, I think that, under the circumstances, he ought to have acted with greater promptness.

In answer to this, the plaintiff suggests that he had been misled by his mother as to the actual date of his birth, and that he supposed that he was a year younger than it now turns out that he is.

I do not think that this affords him any excuse. His competency depends upon his age, not upon what he thinks his age is. If the defendants had misled him, they might be estopped. The fact that his mother misled him—if, indeed, she did—is quite immaterial.

I find as a fact that the defendants acted throughout honestly, without any knowledge of the plaintiff's infancy, and that there is nothing in his appearance to indicate infancy or to provoke inquiry. If it had not been for the fact that the mother's statement was not contradicted, I should have thought from the plaintiff's appearance that he was older than the

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mother states. I do not at all credit his half-hearted statement that he was coerced into making the loan to his father. I think the true situation was, that, at that time, he had confidence in the business in which he was his father's right-hand-man, and thought that the interest of his father and himself was identical.

The action will be dismissed with costs.

## [DIVISIONAL COURT.]

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*Water and Watercourses—Saw-mill Owners—Pollution of Stream—Easement—Crown Patent—Interpretation—Right to Pollute—Correspondence and Documents relating to Patent—Prescriptive Right—R.S.O. 1897, ch. 133, sec. 35—User for Twenty Years—Payments—Interruption—Public Policy—Violation of Statutes—R.S.C. 1906, ch. 115, sec. 19—R.S.O. 1897, ch. 142, secs. 4, 6—Damages—Injunction.*

A creek running through the township of Grattan furnished two water powers, the plaintiff's and the defendants'. The plaintiff's was below the defendants'. Each had a dam and a saw-mill. Below the plaintiff's dam was a beaver meadow, through which the creek flowed. The plaintiff complained that the defendants, during the years 1904 to 1909, had polluted the stream by throwing their saw-dust and other mill-refuse therein, and thereby caused damage to the plaintiff's mill-pond and water power, preventing him running his mill and causing damage to his land. The defendants claimed the right to do as they had done: (1) by virtue of a grant from the Crown; (2) by prescriptive right at common law; (3) by prescriptive right under the Limitations Act, R.S.O. 1897, ch. 33, sec. 35 (now 10 Edw. VII. ch. 34, sec. 35). By the records of the Crown Lands Department, it appeared that the defendants' lots, through which the creek flowed, were sold to their predecessor in title by the Crown in 1855 for a water power and to run a saw-mill and grist-mill. The patent issued in 1859; it contained no reference to the water power or to the mill. The saw-mill was erected in 1855, and was afterwards enlarged and its capacity increased. The plaintiff's predecessor acquired title to his lot, through which the creek ran, about 1870 or 1872, and began to operate his mill about the same time:—

*Held* (RIDDELL, J., dissenting), that the plaintiff was entitled to damages and an injunction restraining the defendants from discharging refuse into the creek to the injury of the plaintiff.

Judgment of LATCHFORD, J., affirmed.

*Per* CLUTE, J., with whom MULLOCK, C.J. Ex. D., agreed:—The defendants' right was limited by the terms of the patent, and could not be enlarged by the correspondence and documents of record relating to the grant. *Wyatt v. Attorney-General of Quebec*, [1911] A.C. 489, applied and followed.

2. The right by prescription under the statute is inchoate till action brought, and the user must be continuous and of right. Certain sums of money paid by the defendants to the plaintiff in each of the years from 1896 to 1903 were paid for the damage occasioned to the plaintiff's property by reason of saw-dust and other refuse being permitted to pass into the stream, and operated as an interruption of the user, preventing any prescriptive right from arising.



3. In the circumstances of the case, there could be no presumption of an implied grant of an easement or right to pollute the creek.
4. Upon the evidence, the payments were not made for injury done over and above what the defendants were entitled to do.
5. Upon the evidence and the finding of the trial Judge, the injury to the plaintiff before 1896 was trifling; it was owing to the increased capacity of the mill that the injury was done, and there could, therefore, be no right before 1896, either by prescription or lost grant, to justify what had been done since.
6. There was sufficient evidence to bring the case within the operation of sec. 19 of the Navigable Waters' Protection Act, R.S.C. 1906, ch. 115. To foul a stream, being prohibited by Act of Parliament, is against public policy; no prescriptive right can be obtained against the policy of the law; and the same principle applies to prevent the presumption of a lost grant from arising.

*Per* RIDDELL, J. (dissenting):—To determine the rights and position of the parties, it was necessary and proper to look at the records of the Crown Lands Department. *Brady v. Sadler* (1890), 17 A.R. 365, followed.

2. The land was sold for a water power and to run a saw-mill and a grist-mill. The grant of land carried with it the right to occupy and use the land and stream, in the manner contemplated, for a saw-mill and grist-mill; there was an obligation enforceable by the Crown that the property should be so used; and it was not necessary that the obligation or right should appear in the patent.
3. A grantee from the Crown stands in no better position than a grantee from a private individual. The purchaser who buys to carry on a particular business has an easement over all the remaining land of his vendor, so far as to entitle him to carry on that business in the ordinary way—the vendor cannot derogate from his own grant. The Crown, by what was done, gave the grantee the right to carry on saw-milling in the ordinary way; and that, at that time, permitted throwing saw-dust and other mill refuse into the creek. That it polluted the water was immaterial—a right to pollute water may be acquired by grant, express or implied.
4. There having been more than twenty years' quiet and uninterrupted user of the easement by the defendants, during the time of the plaintiff and his predecessor, before 1895 or 1896, the existence of a lost grant should be presumed. The doctrine of lost grant has not been affected or become effete by the operation of the statute. *Re Cockburn* (1896), 27 O.R. 450, followed.
5. There being no evidence that the creek itself was navigable, the original of sec. 19 of the Navigable Waters' Protection Act—that is, 36 Vict. ch. 65, sec. 1—would not apply; and, even if it did apply and would void a grant after the statute, there was a time during which the plaintiff's predecessor could have legally granted the easement; and that was sufficient to compel the Court to infer a lost grant at that time. Nor, upon the evidence, could it be found that the later statutes—49 Vict. ch. 36, sec. 7; R.S.C. 1886, ch. 91, sec. 7; R.S.C. 1906, ch. 115, sec. 19—had any application. Criminal statutes are to be interpreted strictly; and the acts of the defendants, continued for so many years, could not be said to be criminal in the sense of violating the statutes of Canada.
6. The Ontario legislation on the same subject, now R.S.O. 1897, ch. 142, sec. 4, from the beginning excepted saw-dust from the prohibition in regard to the pollution of streams; therefore, so far as saw-dust was concerned, there was nothing to prevent the implication that the Crown gave the power to foul the stream; and the same should be held in respect of the other materials from the mill thrown into the stream. If it were contended that the stream was not one within sec. 6 of the Ontario Act, the plaintiff should have the privilege of proving it.
7. In this view, the acts of payment relied on by the plaintiff had no bearing; a right acquired is not divested without something equivalent to a grant; and this applies also to a lost grant.

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8. *Semble*, that, if the acts complained of were illegal, there could be no implication that the grant of land for the purpose of a saw-mill also gave the right to violate the statute. And the law would not imply that the lost grant contained a grant of the right, even as against the grantor, to do an act forbidden by the law.

THE plaintiff was the owner of a lumber mill and farm on Constant creek, in the township of Grattan, and the defendants were the owners of a mill, above the plaintiff's mill, upon the same creek.

This action was brought to recover damages for injury done to the plaintiff by the defendants in fouling the stream and obstructing the flow of water to the plaintiff's mill by throwing refuse in the creek and otherwise injuring the plaintiff.

November 29, 1910, and January 28, 1911. The action was tried before LATCHFORD, J., without a jury, at Pembroke and Ottawa.

*P. White*, K.C., for the plaintiff.

*T. W. McGarry*, K.C., for the defendants.

March 3, 1911. LATCHFORD, J.:—The defence in this case is, that the defendants have a right by prescription, existing for upwards of forty years prior to 1896, to damage the property of the plaintiff. Other issues are, it is true, raised, but I regard them as of no importance.

The mill built in 1855 contained but one saw, according to the evidence taken at Ottawa. As the mill is now, it is equipped with many saws,—with shingle and lath mills, an edger, and other similar appliances. It is not clearly shewn when the property of the plaintiff was first prejudicially affected (see judgment of Sir G. J. Turner, L.J., in *Goldsmid v. Tunbridge Wells Improvement Commissioners* (1866), L.R. 1 Ch. 349, at p. 352), when the primitive state of the mill was altered, or when the various improvements that now exist were made. But it is, I think, fair to assume that the evolution from the one saw of 1855 to the present complex condition has been gradual, and that the property of the plaintiff was not materially affected to his prejudice until 1895 or 1896.

The payment of \$100 to the plaintiff in 1896, more than forty years after the original saw began cutting, is some evidence that

the refuse then discharged over his lands was in excess of what the defendants had any possible right by prescription to send down upon him.

It is disputed that any right to pollute such a stream as flowed between the two mills can be established by lapse of time. This contention would be tenable if the fouling amounted to a public nuisance: see *Blackburne v. Somers* (1879), 5 L.R. Ir. 1. Although an undoubted nuisance to the plaintiff, the pollution of the stream has not been shewn to be a nuisance to the public. In the latter event no prescription could, of course, arise. If prescription as of right existed in favour of the defendants in 1896, it existed only to the extent of the primitive and limited fouling of the stream in 1856, and the years immediately following, which did not materially injure the plaintiff. The payments made by the defendants to the plaintiff for some years after 1896, in addition to what was paid in that year, were, in my opinion, an acknowledgment that the fouling of the stream during those years was greater than the defendants enjoyed as of right, and enjoyment as of right was necessary before the defendants could claim the benefit of the statute R.S.O. 1897, ch. 133, sec. 35. Any easement respecting the saw-dust or refuse from the mill of 1855 or 1856, which the defendants were entitled to, could not be materially altered or increased to the further detriment of the plaintiff. It was held in *Bealey v. Shaw* (1805), 6 East 208, that a mill-owner, who had by twenty years' user acquired a right to divert part of a stream, was liable to an action at the suit of the owner of a mill lower on the stream for a subsequent diversion to the lower mill-owner's injury.

*Baxendale v. McMurray* (1867), L.R. 2 Ch. 790, cited by counsel for the defendants, is not an authority in their favour. It simply decides that a change in the quality of the pollution, where a right to pollute exists, does not destroy the easement, and that the onus of proving an increase (which lay upon the plaintiff) had not been satisfied.

In the present case it had been established that there was an increase in the pollution of the stream, especially in 1896, and the three or four subsequent years. In *McIntyre Brothers v. McGavin*, [1893] A.C. 268, Lord Watson says, at p. 277: "A proprietor who has a prescriptive right to pollute cannot in my opinion use even

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his common law rights in such a way as to add to the pollution." By the compensation made to the plaintiff during this period, any right of the defendants, even their limited right of 1855, was interrupted, and a period of twenty years has not since elapsed. If the refuse of the mill reached the burner and was there consumed, all damage to the plaintiff would be prevented. It is, however, no part of the duty of the Court to inquire how the defendants may best prevent the nuisance to the plaintiff.

I direct that judgment be entered after thirty days in favour of the plaintiff for \$200 and costs. An injunction is also granted restraining the defendants from discharging refuse into Constant creek to the injury of the plaintiff; but the operation of the order is to be suspended for four months to enable the defendants so to alter their mill that no additional damage shall be done.

The defendants appealed from the judgment of LATCHFORD, J.

May 4 and 5, 1911. The appeal was heard by a Divisional Court composed of MULOCK, C.J.Ex.D., CLUTE and RIDDELL, JJ.

*W. N. Tilley*, for the defendants.

*P. White*, K.C., for the plaintiff.

The arguments of counsel and the authorities cited are referred to in the judgments.

June 17, 1912. CLUTE, J.:—The plaintiff is the owner of lot 10 in the 1st concession of Grattan, through which flows Constant creek, and has had for a period of years a dam and water power on the said creek where the same crosses his said lot, from which he derives power to operate a chopping-mill. The defendants own lot No. 9 in the second concession of Grattan, through which also flows Constant creek, where the same crosses their said lot, and thereby they operate a saw-mill on the said lot. The lands and mill of the defendants are higher up on the creek than the lands and mill of the plaintiff. The plaintiff claims to have the stream flow to and through his lands without obstruction or hindrance and without the same being polluted.

He charges that the defendants, at various times during the years 1905 to 1909 inclusive, polluted the stream by throwing into the same saw-dust and other mill-refuse, thereby causing damage to the mill-pond and water power, preventing his running his mill,



and causing damage to his lands; that the matters complained of are contrary to the provisions of R.S.O. 1897, ch. 142; and that the defendants by their dam penned back the waters of the creek and prevented the free and uninterrupted flow thereof to the plaintiff's mill, whereby he was at various times unable to operate the same. The plaintiff claims damages and an injunction restraining the defendants from polluting this stream and penning back the waters thereof, and asks for a declaration of his right to the waters of the said stream.

The defendants deny the plaintiff's right and deny his possession and occupation of the land and of the flow of the said stream, as alleged in the statement of claim. The defendants further set up that in the year 1854 the lands now claimed by the plaintiff and owned by the defendants were vested in the Crown, and the Crown granted to the defendants' predecessor in title lots 7, 8, and 9 in the 2nd concession of Grattan, together with all the water powers thereon, with the right or easement to dam, divert, enjoy, and otherwise use the waters of the Constant creek for mill purposes as they saw fit, and in and prior to the grant imposed upon the grantees the duty to erect, maintain, and operate on the said lands a grist-mill and saw-mill. And they allege that, before the said grant and continuously since the same, the defendants and their predecessors in title maintained and operated the mills as they were bound to do and as they acquired the right to do by virtue of their said grant, and in enjoying the said lands and in operating the said mills they have for more than thirty years prior to the commencement of this action dammed, diverted, enjoyed, and otherwise used the waters of the said creek as of right. The defendants further say that, at the time complained of, the defendants were and are now possessed of mills on the said lands the occupiers whereof for more than forty years before this action enjoyed, as of right and without interruption, the right of damming and diverting or using the water of the said stream and the working of the said mills, and the acts complained of were a user by the defendants of the said right. The defendants further allege that they are entitled to dam, divert, and enjoy or otherwise use the waters of the said creek, by virtue of their natural rights as riparian owners, by virtue of the rights expressly and impliedly granted to their predecessors in title by Crown grant in or about

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the year 1854, and by prescriptive right at common law and by prescriptive right under the provisions of R.S.O. 1897, ch. 133; and, by reason of their rights and easements so acquired, deny that the plaintiff has any cause of action, and say that his action is barred. They further deny that they have committed a breach of the provisions of R.S.O. 1897, ch. 142, and say that, if they have, the plaintiff has no cause of action in respect thereof. The defendants further deny the right and jurisdiction of this Court to try the matters in issue.

The grant to Duncan Ferguson, the defendants' predecessor in title, of lots Nos. 7, 8, and 9 in the 2nd concession of Grattan, is dated the 8th June, 1859, and contains no special grant in respect of the water power or the building of the mill, and expressly reserves to the Crown "the free uses, passage, and enjoyment of, in, over, and upon all navigable waters that shall or may be hereafter found on or under or be flowing through or upon any part of the said parcel or tract of land hereby granted as aforesaid."

It would appear, from the papers put in from the Crown Lands Department, that on the 14th June, 1854, a petition was presented to the Lieutenant-Governor in Council by the United Townships of Bromley and Wilberforce, in the County of Renfrew, setting forth that the inhabitants of these townships and of Grattan had experienced great inconvenience from the want of a supply of sawn lumber for building purposes, and stating that, "If your Excellency and Honourable Council will grant this gentleman, Duncan Ferguson, Esq., the right to purchase 300 acres of land in the newly surveyed township of Grattan, he will build a saw-mill, and in the course of a short time other mills, which would increase the value of the lands for miles around the locality in which they would be placed, and relieve your memorialists and the inhabitants of the township of Grattan from loss and inconvenience," etc.

This was followed by a further memorial from the Municipal Council of the Township of Admaston, in the County of Renfrew, to the same effect.

A copy of a report of a committee of the Executive Council, dated the 3rd June, 1858, and approved by the Governor in Council on the following day, sets forth that the lots in question were sold as a mill-site under an order in council on the 3rd July, 1854,

subject to the building of a saw-mill and a grist-mill, and that it appears that the necessary dams and a first-class saw-mill had been erected, while the materials were on the ground for a grist-mill. Under these circumstances, he recommends that the patent be allowed to issue, in the anticipation of the complete fulfilment of the conditions of sale, upon payment of the purchase-money in full.

Since the argument, the report of the case of *Wyatt v. Attorney-General of Quebec*, [1911] A.C. 489, has come to hand. That was an appeal from the judgment of the Supreme Court of Canada. It was there contended that the letters patent should be construed having regard to the correspondence and course of dealing between the parties and the Government relating to the grant. The judgment of the Judicial Committee was delivered by Lord Macnaghten. He repeats the closing words of the judgment delivered by Girouard, J.: "‘Summarised,’ says the learned Judge, ‘our holdings are:—That the patent issued by the Crown is plain and unambiguous in its language; that the rights of the parties must be determined by it, and cannot be added to, altered, or diminished by any previous negotiations written or oral leading up to its issue; that therefore the application of the patentee and subsequent correspondence between him and the Crown officials should not have been received in evidence for the purpose of explaining the patent, and, if looked at for the purpose of establishing an independent or collateral contract conferring additional rights upon the patentee, entirely failed to do so; that the legal effect of the language of the patent with respect to the bed of the river and the fishing rights therein depends upon the determination of the question whether the Moisie at and in the four or five of its miles covered by the patent is navigable or floatable within the meaning of the law of Quebec, and that, adopting the test of navigability laid down by the Privy Council . . . we concur with the findings of the trial Judge, and which findings are not questioned in the judgment of the Court of Appeal, that such river at such locality and from thence to its mouth is so navigable and floatable.’”

The effect of this decision upon the present case is, I think, to limit the defendants’ right to the terms of the patent, which

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cannot be enlarged by the correspondence relating to the grant above referred to.

The trial Judge found in favour of the plaintiff for \$200 and costs, and granted an injunction restraining the defendants from discharging refuse into the creek to the injury of the plaintiff; the order to be suspended for four months to enable the defendants so to alter their mill that no additional damage may be done.

The right by prescription claimed in this case under the Limitations Act, 1910, 10 Edw. VII. ch. 34, sec. 35 (R.S.O. 1897, ch. 133, sec. 35), is inchoate till action brought, and the user must be continuous and of right. "The periods mentioned in the Act" (corresponding to our statute) "are periods next before some action wherein the claim or matter to which such period relates is brought into question. Consequently, although the Act apparently renders the right indefeasible after twenty years' user, the combined operation of these two provisions renders it necessary for a person seeking to establish a prescriptive claim under the statute to prove uninterrupted enjoyment for a period of twenty years immediately previous to and terminating in some action or suit in which the right is called into question." Halsbury's Laws of England, vol. 11, p. 272, sec. 542, where the authorities are collected—*Hyman v. Van den Bergh*, [1908] 1 Ch. 167 (C.A.); *Parker v. Mitchell* (1840), 11 A. & E. 788; *Wright v. Williams* (1836), 1 M. & W. 77; *Richards v. Fry* (1838), 7 A. & E. 698; *Ward v. Robins* (1846), 15 M. & W. 237, 242. "The period is not necessarily the period before the pending action; it may be the period before any action in which the right was brought into question:" *Cooper v. Hubbuck* (1862), 12 C.B.N.S. 456.

There is no doubt that the defendants and their predecessors in title have used their saw-mill since it was erected in 1854. At that time it was a comparatively small mill. It does not appear clearly when the various improvements that now exist were made. The trial Judge thinks it fair to assume that the evolution from the one saw of 1855 to the present complex condition has been gradual, and that the property of the plaintiff was not materially affected to his prejudice until 1895 or 1896.

In 1896, the defendants paid to the plaintiff \$100, and subsequent thereto, down to the year 1903, paid the sum of \$10. The



plaintiff contends that these payments are a complete answer to the defendants' claim to a prescriptive right. It, therefore, becomes important to ascertain, with as much accuracy as possible, precisely what these payments were for.

At p. 49 of the evidence, one of the defendants says:—

"Q. Coming down to 1896, you made some arrangement with Mr. Hunter senior, at that time? A. Yes.

"Q. You paid him some money? A. Yes.

"Q. How much? A. \$100.

"Q. What was that for? A. For saw-dust that went down on to his beaver meadow.

"Q. How did it come to get there that year? A. His dam, part of his dam, broke away, and the saw-dust that was lodged above his dam went down over his meadow, and I paid him \$100 for it.

"Q. Did you make any arrangement for the succeeding years? A. Yes; he said he would put all the mill-refuse and flood-wood that went down the river through past him for \$10 a year.

"Q. And that continued until what year? A. Until 1903, until I put up my burner.

"Q. You paid him that \$10 a year each year? A. Yes.

. . . . .

"Q. Since 1903, what have you done with your saw-dust? A. I have been burning it principally.

"Q. Did you erect a modern burner? A. Yes.

"Q. And it is supposed to take care of all the saw-dust? A. Yes.

"Q. What became of the refuse generally around the mill, the other refuse besides the saw-dust? A. It went into the burner.

"Q. Since 1903? A. Yes."

On the 3rd June, 1908, the defendants sent their men to remove the refuse from the plaintiff's meadow, and made a memorandum of it in the following words: "Sent John Creighton and young Francois down to pick off our mill-refuse off William Hunter's meadow, but he refused to let the men go on to pick it off. He had sent up word with Creighton on Thursday May 28th, '08, for me to send down men to take it off."

"Q. If it was not damaging him, why did you send men down to take it off? A. Because he asked me to.

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“Q. But because he was a neighbour? A. Yes; it makes a big difference.

“Q. And it was not doing him any damage, of course? A. Well, if it was on his meadow where the hay was growing, it certainly would do him damage.

“Q. I should think it would have been fair enough to have said that long ago? A. The point I contend was that I paid him for that meadow, and for all the damage that was done to it, and if hay was grown since he has got the benefit of it.

“Q. You paid him in 1906, and this was in 1908. You did not get a deed of the meadow? A. I didn't want a deed.

“Q. But that is how you fix your conscience to the point of saying you have done him no damage, because in 1906 you paid him too much. A. I consider that I paid him for all the damage I had done to his meadow.

“Q. Or could do afterwards? A. Yes, because he claimed the meadow was useless to him.

“Q. And that is the reason that you now say you have not done any damage to his meadow? A. Yes.

“Q. It is not by reason of the fact that you have not put down stuff on it? A. I put a little stuff down on it, I will admit that.

“Q. But you say you ought not to pay him for it, because you paid him \$100 in '96? A. Yes.

“Q. Did you take a receipt for that? A. I placed it to my credit in my books.

“Q. Have you got the entry? A. I will have to go out in the hall for it. My ledgers are in the hall.

“Q. We will wait for you. A. 'By damage done to meadow \$100'—1906 or 1904—no, I beg your pardon, 1906.

“Q. You mean 1896? A. 1896, I beg your pardon.

“Q. What date? A. In the spring of the year he was getting lumber right along, and there was a little contention about what we would have to pay him, and we left it open until we balanced up in the fall, and I placed it to his credit then.

“Q. You allowed him \$100 in the fall? A. Yes.”

He is then asked as to the quantity of saw-dust that went down upon the meadow:—

“Q. A hundred dollars' worth? A. It was the meadow that was the hundred dollars. It wasn't the saw-dust was a hundred

dollars. It was the damage I done the meadow that I paid the hundred dollars for.

"Q. Well it did damage that cost you \$100, the saw-dust that went out? A. Yes."

I think the plain meaning of what took place is, that, the plaintiff complaining of the injury to his property by reason of saw-dust and other refuse being permitted to pass into the stream, the defendants paid \$100 in 1896 for the damage so occasioned, and paid \$10 a year thereafter until 1903, when they erected their burner in order to destroy the refuse of the mill and prevent it from going into the stream. This, in my opinion, operated as an interruption to the prescriptive right.

In *Gardner v. Hodgson's Kingston Brewery Co.*, [1903] A.C. 229, it was held that, where for more than 40 years without interruption the owner of a house used a cart-way from his stables through the yard of an adjoining inn to the public road, paying each year 15s. to the owners of the inn-yard, the inference of fact from the evidence was, that the payment was made for leave to use the way, and that there had been no enjoyment of right within the Prescription Act, and that there was no ground for presuming a lost grant. Halsbury, L.C., says, at p. 231: "One of the most common modes of preventing such a user growing into a right is to insist upon a small periodical payment, and if such evidence as we have here were permitted to be evidence of a right, not only to the user upon terms of payment, but of a right to make the payment and continue the user in perpetuity, it would be a very formidable innovation indeed. Those who drafted the Prescription Act knew well what they were about when, in dealing with the consequences which have to follow from long-continued user, they used the words 'as of right.'" Lord Macnaghten says, at p. 234: "Can a person who uses a way across his neighbour's land, and pays for the use of it year by year, be said to use the way 'as of right'? Again, I think every layman and most lawyers would answer, 'Certainly not.' If the way in question has not been used 'as of right,' there is nothing to attract the provisions of the Prescription Act. The case of the appellant, so far as it is founded on that Act, must fail. It was for the plaintiff to make out her case. If she cannot shew that the user of the way was 'as of right,' the essential condition of success is wanting." And, at p. 235, he

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further says: "The suggestion of a lost grant burdening the respondents' property with a servitude which would so greatly diminish its value, and charging the appellant's property with a rent-charge in perpetuity, is, I think, out of the question. It seems to me a most unlikely hypothesis. But it is enough to say that, apparently, no trace of such an arrangement can be found in any of the deeds of either party, and that nothing is known of the circumstances which existed when the premises, which now belong to the appellant, and the premises which now belong to the respondents, if they ever formed one property, became separated. There is certainly no need to resort to the presumption of a lost grant when the facts of the case, so far as they are known, suggest a much simpler and a more natural explanation."

In the present case, it seems to me idle to argue in favour of a lost grant. In the case of *Angus v. Dalton* (1877-8), 3 Q.B.D. 85, 4 Q.B.D. 162, and *Dalton v. Angus* (1881), 6 App. Cas. 740, the origin and effect of the doctrine of a lost grant was much discussed. The case is referred to in Goddard's Law of Easements, 7th ed., pp. 176 to 182. The author points out the difficulty to extract from the judgments and various opinions of the Judges any certain rule or principle of law. The learned author says, at p. 172: "It is not in every case where there has been user or enjoyment for the requisite period that the doctrine of presumption of lost grant can be applied. The doctrine can only be applied to easements which could, if the evidence were sufficient, be claimed by prescription at common law, and the expedient of presuming a lost grant is only applicable to cases where the evidence or some technicality prevents the application of the principle of prescription at common law, to which only it is ancillary." He further points out: "If a right is claimed under the lost grant doctrine, the question arises whether evidence is admissible on behalf of the party interested in defeating the presumption, either to prove positively as a fact that no grant ever was made, or to shew circumstances from which its non-existence may reasonably be inferred."

There appears to be no actual decision on this point. The result of the authorities, according to the view of the learned author, is, that, if the evidence of user is not satisfactory, though uncontradicted, or if evidence to rebut this presumption is given,



it is open to the Court or jury to find the fact or not according to conviction. This point was fully discussed in *Angus v. Dalton*.

In our own Courts, in *Re Cockburn* (1896), 27 O.R. 450, it was held that, where twenty years of open and uninterrupted user is proved, the jury may and ought to presume a lost grant.

The implication of a lost grant does not arise to do an act forbidden by the law: *Rochdale Canal Co. v. Radcliffe* (1852), 18 Q.B. 287; *Neaverson v. Peterborough Rural District Council*, [1902] 1 Ch. 557 (C.A.) "In inferring a legal origin for such user, it (the Court) cannot infer one which would involve illegality:" per Collins, M.R., at p. 573.

It is laid down by Gale, *Easements*, 8th ed., pp. 194, 195, 197, that evidence is admissible to rebut the presumption, but the views of Judges differ as to what evidence is sufficient for that purpose. Although the doctrine of lost grant received a severe shock in *Angus v. Dalton*, it has not been put an end to by the statute: *Leconfield v. Lonsdale* (1870), L.R. 5 C.P. 657, 726; Gale, p. 199. No grant can be implied unless such implication is rendered reasonable by the surrounding circumstances or the act of the parties: Goddard, 7th ed., p. 127.

In *Rangeley v. Midland R.W. Co.* (1868), L.R. 3 Ch. 306, 310, Lord Cairns says: "Every easement has its origin in a grant expressed or implied. The person who can make that grant must be the owner of the land. A railway company cannot grant an easement over the land of another person. They may grant an easement as soon as they become the proprietors of the land but not until they become such proprietors. They must own the servient tenement in order to give an easement over the servient tenement." See *London and North Western R.W. Co. v. Evans*, [1892] 2 Ch. 432.

A grant cannot be presumed if an actual grant would have been void by reason of an Act of Parliament: *Mill v. Commissioner of New Forest* (1856), 18 C.B. 60. It is sufficient to prevent the acquisition of a prescriptive right that the grant would have been at variance with the purpose of the Act: Goddard, p. 243; *Rochdale Canal Co. v. Radcliffe*, 18 Q.B. 287. In deciding the question of a lost grant, all the surrounding circumstances must be taken into consideration: *Birmingham Dudley and District Banking Co. v. Ross* (1888), 38 Ch.D. 295.

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We have the grant itself, and no such right as is claimed is given. It is true that the defendants' predecessor in title was permitted to purchase the land upon which his mill was afterwards erected, upon the understanding that he should build a saw-mill; but this does not, in my opinion, raise the presumption of an implied grant to foul the stream.

The case of *Attorney-General v. Harrison*, 12 Gr. 466, was decided in the year 1866, and prior to any legislation, so far as I can find, restricting the right of putting saw-dust in streams in navigable waters. In that case, the Crown, in making sale of a lot of land situate upon a navigable stream, stipulated that the purchaser should erect on the property a saw-mill, as well as a grist-mill; and it was there held that "this did not warrant the purchaser in creating a nuisance in the river by throwing into the water the saw-dust and refuse of his saw-mill, the effect of which was to create obstructions in the river to such an extent as to injure or impede the free use of the river by vessels navigating the same." The case was tried before Spragge, V.-C., who gave a considered judgment. At p. 470, he says: "The rights of the public in navigable waters are correlative with those of a riparian proprietor, nor is it any answer or any justification in either case that the injury is not very great, or that it is compensated by some public benefits. It is said in this case that the defendant's mill is a public benefit, and in proof of its being so . . . the defendant's counsel point to the fact that in making the sale of the mill-site by the Government it was made a condition that the purchaser should erect as well a saw-mill as a grist-mill thereon. But in *Rex v. Ward* (1836), 4 A. & E. 384, it was held, that if an erection in a navigable river be in fact a nuisance it is no answer to say that a resulting public benefit has counterbalanced the nuisance." And again, at p. 473: "The defendants make a more serious point of this, that by the conditions of sale (to which I have referred) they were bound to put up a saw-mill; that it is in the ordinary practice, in saw-mills worked by water, for the saw-dust to be allowed to drop into the stream, and that this being done must have been contemplated by the Government when the sale was made. That, however, can amount to no more than this, that the obligation to erect a saw-mill imposed by the Crown, carried with it an implied license to drop saw-dust into the river.

This position is open to more than one answer. One is that the Crown cannot grant a license to commit a public nuisance. It would be licensing an individual to do that which interferes with a right which is the common inheritance of the people. Another is, that such a license is not to be implied; it would be derogating from the honour of the Crown to assume an intention to do that which would be injurious to the people; and it would be assuming ignorance on the part of the Crown of its own powers and of the rights of the subject." And again, at p. 472: "The defendants say that they have been in the habit for a number of years of allowing their saw-dust to float down the river without any objection being made to it. There is clearly nothing in this; for no length of time will legitimize a public nuisance, the soil being in the Crown, and the user the common inheritance of the public at large."

We have in clear evidence the original grant and the subsequent user. By the first the land is alone granted; as to the second, in my opinion, there has been an interruption of the alleged user preventing any prescriptive right from arising. I think it may fairly be said, upon the evidence, that the user was at all times contentious, was objected to, and these objections were afterwards recognised as valid by the payments that were made, and by making provision to burn the refuse. See *Burrows v. Lang*, [1901] 2 Ch. 502, 510; Goddard, 7th ed., p. 258.

Mr. Tilley strongly urged that the payment of the \$100 and the \$10 was for injury done over and above the prescriptive title. It is, I think, a sufficient answer to that position to say that no such claim was made at the time of payment; no suggestion was made that a limited prescriptive right was claimed or that the payment was for the excess.

There is a further difficulty in the plaintiff's way. The learned trial Judge has found that, prior to 1896, the injury to the plaintiff was comparatively trifling. It was owing to the increased capacity of the mill that the injury has been done. There could, therefore, be no right prior to 1896, either by prescription or lost grant, to justify the user of the mill as it has been used since that date.

In *Crossley and Sons Limited v. Lightowler* (1867), L.R. 2 Ch. 478, 481, Lord Chelmsford, L.C., decided that a prescriptive right having been acquired to pour foul water into a stream, and the fouling having been increased by the erection of new factories in

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the place of those to which the right was attached, "the user which originated the right must also be its measure, and it cannot be enlarged to the prejudice of any other person."

In *Goldsmid v. Tunbridge Wells Improvement Commissioners* (1865), L.R. 1 Eq. 161, the Master of the Rolls expresses his opinion (p. 169) that, "when the pollution is increasing, and gradually increasing, from time to time, by the additional quantity of sewage poured into a stream, the persons who allow the polluted matter to flow into the stream are not at liberty to claim any right or prescription." But in *Attorney-General v. Acton Local Board* (1882), 22 Ch.D. 221, which is a similar case, Fry, J., treated the prescriptive right claimed, not as a right belonging to the inhabitants of Acton as a class, but as an individual right belonging to the older occupants of houses; so that any occupant whose house had drained into the stream for twenty years would have a right to continue to drain into it. Goddard, referring to these cases, takes the view that, if the pollution, at its commencement, or twenty years before the action, was defined in amount, and originated from a cause certain, as a factory or any definite number of houses, a prescriptive right may be acquired, and the measure of the right will be the extent of pollution at the commencement of the user, or at the beginning of the twenty years, but otherwise it is doubtful if any right can be gained.

In considering a case of this kind, it should not be forgotten that it is a well-established rule of law that every land-owner has a natural right, that the water of a natural stream which passes over his land shall be suffered to continue in its natural state, that is, not only that it shall be uninterrupted in its course, but also that it shall be suffered to continue in its naturally pure condition. The leading case for this principle is *Wood v. Waud* (1849), 3 Ex. 748. See Goddard, p. 105.

In *Wood v. Waud*, it was proved that many other manufacturers poured filthy water into the stream, so that the damage caused by the defendants was imperceptible; but it was held that the plaintiffs had received damage in point of law, for they had a right to the natural stream flowing through their land in its natural state as an incident to the property in the land through which the watercourse flowed, and the right continued, notwithstanding the pollution from other causes. See Goddard, p. 106.



It is here necessary to inquire whether the Navigable Waters' Protection Act, R.S.C. 1906, ch. 115, sec. 19, creates a prohibition of the defendants fouling the stream in the present case. That section provides that "no owner or tenant of any saw-mill, or any workman therein or other person, shall throw or cause to be thrown, or suffer or permit to be thrown any saw-dust, edgings, slabs, bark or rubbish of any description whatsoever into any river, stream or other water, any part of which is navigable or which flows into any navigable water." That section is, I think, applicable to the present case. It would appear to have been originally introduced in modified form by 36 Vict. ch. 65, sec. 1, and carried into the subsequent statutes: 49 Vict. ch. 36, sec. 7; R.S.C. 1886, ch. 91, sec. 7. There was, I think, sufficient evidence to bring this case within the operation of the statute.

The principle that would apply is, that to foul a stream, being prohibited by Act of Parliament, is against public policy, and no prescriptive right could be obtained against the policy of the law; and the same principle applies to prevent the presumption of a lost grant arising in such a case.

In Halsbury's Laws of England, vol. 11, p. 267, sec. 533, it is said: "The Court will not presume a lost modern grant which, had it ever existed, would have been in contravention of the provisions of a public statute, or of a custom:" citing *Neaverson v. Peterborough Rural District Council*, [1902] 1 Ch. 557 (C.A.), per Collins, M.R., at p. 573; *Rochdale Canal Co. v. Radcliffe*, 18 Q.B. 287; *Clayton v. Corby* (1843), 5 Q.B. 415; *Goodman v. Saltash Corporation* (1882), 7 App. Cas. 633, 648.

In my opinion, the judgment of the trial Judge is right and ought to be affirmed and the appeal dismissed with costs.

MULOCK, C.J.:—I agree.

RIDDELL, J. (dissenting):—In and through the township of Grattan runs Constant creek, which, at the places in question in this action, furnishes two water powers—that up the stream being the defendants', with a dam affording a head of from 11½ to 14¾ feet; that down the stream, the stream flowing nearly due south, being the plaintiff's, with a dam affording a head of 8 ft. 7 in. to 11 ft. 7 in., the pond being 14¼ acres in extent. Below the plaintiff's dam is a beaver meadow, through which the stream

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flows, making in the meadow an angle, almost a right angle, to the right, down stream.

The plaintiff has a mill upon his premises, badly out of repair, and not now in use: the defendants are running a saw-mill.

The complaint is that the defendants, during the years 1904 to 1909 inclusive, have polluted the stream by placing therein "saw-dust, bark, shingle edgings, roots, cull shingles, and other mill-refuse, thereby causing damage to the plaintiff's said mill-pond and water power, preventing him running his said mill and causing damage to his said land." A complaint is also made that the defendants penned back the water, etc.; but this is not pressed, having been found against at the trial.

The defendants claim: (1) that they have the right to do as they have done by virtue of a grant from the Crown; (2) prescriptive right by the common law; and (3) by statute R.S.O. 1897, ch. 133.

To determine the rights and position of the parties, it is necessary to look at the Crown Lands Department records—and this is proper: *Brady v. Sadler* (1890), 17 A.R. 365.

From the records of the Crown Lands Department, Toronto, it appears that a petition was presented to the then Governor-General, Lord Elgin, in 1854, alleging that the inhabitants of Grattan, Bromley, and Wilberforce suffered from want of sawn lumber, and that Duncan Ferguson, Esq., would erect a saw-mill if he was granted the right to buy 300 acres of land in Grattan—the petition asked that this be done. The Township of Admaston sent in an identical petition during the same month, June, 1854. Representations were made in August against the proposition; but in July, 1854, the Governor-General in Council approved of a report of the Commissioner of Crown Lands that the three lots be offered for sale at four shillings per acre, one-fourth down at the time of sale, the remainder in three annual instalments, on condition of the purchaser building a saw-mill within twelve months and a grist-mill within eighteen months from the date of sale, of a description suitable to the capacity of the mill-site. Accordingly, on the 20th July, 1854, a notice was given by the Crown Lands Department that lots Nos. 7, 8, and 9 in the 2nd concession of Grattan, 300 acres, would be offered for sale by the resident agent at Renfrew on the 29th August. Conditions of

sale: price as already mentioned; "the purchaser to build a saw-mill within twelve months and a grist-mill within eighteen months;" upset price four shillings per acre. Cameron and Ferguson bought, and gave security (Crown sale 12739).

In June, 1858, the Governor-General approved a report of a committee of the Executive Council approving a recommendation of the Commissioner of Crown Lands, which says: "The lots in question were sold as a mill-site under an order of council of the 30th July, 1854, subject to the building of a saw-mill and a grist-mill, and that it appears by the evidence filed that the necessary dams have been erected and a first-class saw-mill, while the materials are on the ground for a grist-mill. Under these circumstances, he recommends that the patent be allowed to issue, in anticipation of the complete fulfilment of the conditions of sale, upon payment of the purchase-money in full."

In 1859, the balance of the purchase-money was paid; Cameron had in 1856 conveyed all his rights in the three lots to Ferguson; and on the 3rd June, 1859, a patent issued to Ferguson of the three lots.

By thus issuing the patent without enforcing the condition that a grist-mill should be built, as it is said was done, the condition was simply changed into a contract which the Crown might enforce at pleasure or abandon if that course was for any reason thought advisable: *Behn v. Burness* (1863), 3 B. & S. 751 (Cam. Scacc.); *New Hamburg Manufacturing Co. v. Webb* (1911), 23 O.L.R. 44. But the land was sold as for a water power and to run a saw-mill and a grist-mill—of this there can be no shadow of doubt. There can be as little doubt that the grant of land, under these circumstances, carried with it the right to occupy and use the land and the stream, in the manner contemplated, for a saw-mill and grist-mill—and further that there was an obligation enforceable by the Crown that the property should be so used. And it is not at all necessary that the obligation or right should appear in the deed.

In *Robinson v. Grave* (1872), 27 L.T.N.S. 648, Wickens, V.-C., says, in the case of a grant made for the purpose of the grantee building, that when the grant does not notice the intention of building, but both grantor and grantee know that the purpose is building, an equitable right is obtained co-extensive with the legal

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right which would have been obtained if the grant had noticed the intention of building. In that case the building was put up between contract and conveyance, just as in this the saw-mill was put up between contract and grant.

I do not cite other cases, though they are not few—the question is not, what does the grant contain? but, what did the parties contemplate at the time of the contract and deed?

If the grantee has covenanted or contracted to do a certain act or carry on a certain trade, etc., the case is, if anything, even *â fortiori*: *Siddons v. Short* (1877), 2 C.P.D. 572. And it can make no difference that the contract appears in the conveyance of the land, or, as here, in conditions of sale accepted by the vendee. It is not contended that a grantee from the Crown stands in any other position than a grantee from a private individual.

“No strained or extravagant construction is to be made in favour of the King . . . royal grants are to receive a fair and liberal interpretation . . .” Chitty, *Prerogative of the Crown* (1820), p. 393. “If the King’s grants are upon a valuable consideration, they shall be construed strictly for the patentee for the honour of the King:” *ib.*, p. 394. When an owner of land sells a portion thereof for a particular purpose, he cannot derogate from his own grant—this is plain equity. “He is bound to abstain from doing anything on the remaining portion which would render the demised (or sold) premises unfit for carrying on such business in the way in which it is ordinarily carried on . . .” Stirling, J., in *Aldin v. Latimer Clark Muirhead & Co.*, [1894] 2 Ch. 437, at p. 444.

In other words, the purchaser who buys to carry on a particular business has an easement over all the remaining land of his vendor, so far as to entitle him to carry on that business in the ordinary way—the vendor cannot derogate from his own grant. “The principle that a man may not derogate from his own grant is one of considerable importance with regard to easements, for it frequently happens that it would be an act in derogation of a grant to stop the user of an easement which has not in fact been granted to one who claims it” (Goddard on Easements, 7th ed., p. 139); “and as the law will not allow a land-owner to prevent that enjoyment, an easement is thus practically acquired, although no ex-



press grant of the easement has been made." Consequently, the Crown, by what was done, gave the grantee the right to carry on saw-milling "in the ordinary way"—and that, it is admitted, was, at that time, throwing saw-dust, etc., into the stream. The natural result being that this was carried down stream over and between other lands of the Crown, the grantee acquired the easement over such lands necessary to enable him to carry on in the ordinary way his business. That this "polluted" the water is immaterial—"a right to pollute water may be acquired by grant, express or implied:" Goddard, 7th ed., p. 355—and not less than others on the doctrine that a vendor cannot derogate from his own grant.

In *Hall v. Lund* (1863), 1 H. & C. 676, S., the owner of certain land, demised part of it, a mill, to the defendant, described as a "bleacher." This had been used as bleaching works, and it was mentioned (in effect) in the lease that it was for the purpose of carrying on the business of bleaching. The defendant entered and carried on his business as a bleacher, which involved throwing into a stream passing through S.'s other land a considerable amount of foul and polluting matter, pulp, refuse, drugs, etc. The plaintiff bought the other land of S. and the reversion of the mill. Pollock, C.B., "cannot see any difference" between "the lessee using the stream for the purpose of carrying off his refuse" and "taking water from a stream and returning it in a foul condition," and adds: "The plaintiff, who purchased the reversion, stands in the same position as the lessor, and cannot derogate from his own grant:" p. 683. Channell and Wilde, BB., also considered that the lessor, having demised the premises for the purposes of bleaching, neither he nor those claiming under him could derogate from their own grant. See Gale, 8th ed., p. 124.

*Ewart v. Cochrane* (1861), 4 Macq. H.L. 117, is another case of right to foul a stream being acquired by implied grant—implied because this was necessary for the convenient and comfortable enjoyment of the property granted, not essentially necessary so that the property granted would be valueless without it (p. 123). Lord Chelmsford says (p. 125): "It was essential to the enjoyment of the tan-yard, and therefore one must imply a grant to D. when the tan-yard was conveyed to him . . ."

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There are other cases, not of pollution, decided on the same principle, *e.g.*, *Siddons v. Short*, 2 C.P.D. 572. The plaintiffs desired to build an iron foundry, and bought land from the defendants for that purpose—nothing being said in the deed as to the purpose. The defendants were prevented from mining for coal upon the rest of their land so near as to imperil the plaintiff's building, although the deed contained no grant of right to support, and the natural right to support for the land unburdened would not have entitled them to support for their new buildings.

I think the Crown was bound not to prevent the purchaser acting in the ordinary course of saw-milling at that time, and could not object to his doing so in virtue of ownership of lands lower down.

The saw-mill began operations in 1855, as stated at the trial, not disputed, and in effect found by the trial Judge—the witness Bower and others prove it satisfactorily—Ferguson, the grantee, and Cameron, his partner, operating it.

At some time—when, does not appear—the plaintiff acquired title to lot 10; his father, apparently, before him, owned the land; the furthest back I can find any reference to this ownership being at p. 23, where the plaintiff says that his father had been running a saw-mill at the point for eighteen or twenty years, and stopped, as he supposes, twenty years ago. This is just a guess apparently (p. 24); but, if we accept it, and if (which does not appear) the father began sawing as soon as he got a patent (if he did get one) of the land, the date is carried back to 1872 or 1870. In any event, the predecessor in title of the land of the plaintiff obtained his patent subsequent to that of the predecessor in title of the land of the defendants. If such be not the fact, it was for the plaintiff to make it clear; and he should be allowed to put in the patent of lot 10. The plaintiff's predecessor took no more by his grant than the Crown had to give him; and, consequently, the plaintiff holds the land subject to the easement already mentioned, unless something more appears in the case.

The Registry Act does not assist the plaintiff. From the first Registry Act in Upper Canada, in 1795, 35 Geo. III. ch. 5, the operation of the statute is limited to a period after the grant from the Crown. It will, however, be proper to consider what took place after 1855. The evidence does not warrant any finding

other than that until 1895 or 1896 the defendants' predecessors in title used the stream as a vehicle for carrying off the saw-dust, etc., from the upper mill, and that no substantial change took place.

I think we are bound by the decision of the Divisional Court in *Re Cockburn*, 27 O.R. 450, to hold "that where twenty years' open and uninterrupted user is proved, a jury may and ought to presume the existence of a lost grant, if . . . there be no evidence in denial, explanation, or modification of the actual enjoyment, and that this presumption cannot be displaced by merely shewing that no grant was in fact made, though it is rebutted if there be an incapacity to grant the easement, extending over the whole period in the course of which the right (if granted at all) must have been granted:" p. 467. I do not discuss the many cases before *Re Cockburn* and *Dalton v. Angus*, 6 App. Cas. 740, upon which it is founded.

That the doctrine of lost grant has not been affected or become effete by the operation of the statute, is clear. More than twenty years' quiet and uninterrupted user of the easement took place during the time of the plaintiff and his father, before 1895 or 1896.

The statutes of Canada against throwing saw-dust, etc., into navigable waters are appealed to. The first of these is (1873) 36 Vict. ch. 65, sec. 1, assented to on the 23rd May, 1873, which forbids owners, etc., of saw-mills throwing saw-dust, etc., "into any navigable stream or river either above or below the point at which such stream or river ceases to be navigable." Even supposing that this statute should be held to apply to the Constant creek, and that it would void a grant after the statute, there was a time during which the predecessor in title of the plaintiff could have legally granted the easement claimed; and that, according to the authorities quoted, is sufficient to compel us to infer a lost grant at that time. The enactment of the statute would or might not affect the rights of the owners *inter se*.

In 1886, by 49 Vict. ch. 36, sec. 8, this Act was repealed, and sec. 7 introduces a provision somewhat different: "No owner . . . of any saw-mill . . . shall throw . . . any saw-dust, edgings . . . into any river, stream or other water any part of which is navigable, or which flows into any navigable

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water . . .” This became R.S.C. 1886, ch. 91, sec. 7, and is now R.S.C. 1906, ch. 115, sec. 19.

There is no evidence that Constant creek itself is navigable—so that the original Act of 1873 would not apply; nor is the evidence such as that it could be found that the later statutes have any application. The branch of the Constant upon which these mills are situated is above Ferguson Lake—it flows into that lake, which is about a mile long—but there is no evidence that this lake is navigable. Then a stream flows from Ferguson Lake down to McNulty Lake or “eddy, you couldn’t call it a lake,” and then to Calabogie Lake, which is navigable. It is not apparently the case of a large stream or river having an expansion in its course, like the River St. Lawrence and Lake St. Louis, but rather like a chain of lakes—at least so far as Ferguson and Calabogie are concerned—with streams connecting the upper with the lower. It seems to me that the stream, twenty miles away, can no more be said to flow into Calabogie Lake than the St. Clair can be said to flow into Lake Erie. Criminal statutes are to be interpreted strictly; and I am unable to convince myself that the acts of the defendants, continued for so many years, are criminal in the sense of violating the statutes of Canada.

The Ontario legislation, now R.S.O. 1897, ch. 142, sec. 4, from the beginning excepted saw-dust: see C.S.U.C. ch. 47, sec. 2. And, moreover, in the body of the section itself, sec. 4, it is made applicable, not to all streams, but to all except those thereafter mentioned—those are set out in sec. 6, and, amongst others, include “rivulets wherein salmon, pickerel, black bass or perch, do not abound.” The exception is contained in the section creating the offence and imposing the penalty—and in such cases the person alleging an offence against the statute must, at least in civil proceedings, prove that the case is one to which the general words apply. See the cases cited by Lord Alverstone, C.J., in *Rex v. James*, [1902] 1 K.B. 540, at pp. 544, 545. At the worst, in view of the long and uninterrupted course of action by the defendants and their predecessors in title, one should not hold that the prohibition did exist, without clear evidence of the application of the statute.

So far then as saw-dust is concerned, there is nothing to prevent the implication that the Crown gave the power to foul the stream; and, as I think, the same should be held in respect of the other



materials from the mill thrown into the stream. If, indeed, it were contended, as I think it is not, that the stream is not one within sec. 6, the plaintiff should, if it be material, have the privilege of proving it if he can.

If this view be correct, none of the acts relied upon by the plaintiff of payment by the defendants have any bearing—a right acquired is not divested without something equivalent to a grant—the mere payment of money may be and often is cogent evidence of what the person paying conceives his rights to be, but it does not determine what the rights are, or by itself derogate from rights actually existing. And the same remarks apply, as I think, to a lost grant.

But I agree that, if the acts complained of were illegal, there could be no implication that the grant of land for the purpose of a saw-mill also gave the right to violate the statute. And the law would not imply that the lost grant to be found contained a grant of the right, even as against the grantor, to do an act forbidden by the law: *Rochdale Canal Co. v. Radcliffe*, 18 Q.B. 287; *Neaverson v. Peterborough Rural District Council*, [1902] 1 Ch. 557, reversing *S.C.*, [1901] 1 Ch. 22.

I do not discuss the statute or the effect of the more or less ambiguous payments upon any right to be acquired under the statute. It would appear that the learned trial Judge thought that the yearly payments were for a use of the waters in excess of the right acquired by the defendants under the statute—but that I do not go further into. It seems that no greater amount of sawdust, etc., has, since the burner was erected in 1903, been placed in the stream than before the first payment. I cannot see that the plaintiff has made out a case. If the right came by implication from the Crown, with the patent, it does not appear that any excess has been committed—and if by implication through a lost grant, the same statement applies.

If the plaintiff desires to be permitted to shew that the stream is not within sec. 6 of the Ontario Act, he should be allowed to do so, in which case the costs of action, appeal, and new evidence should be reserved to be disposed of upon the renewed application to this Court—but, if not, the appeal should, in my view, be allowed with costs, and the action dismissed with costs.

*Appeal dismissed; RIDDELL, J., dissenting.*

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## [IN THE COURT OF APPEAL.]

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June 18.

REX V. HONAN.

*Criminal Law—Keeping Common Betting-house—Jurisdiction of Police Magistrate—Criminal Code, secs. 773, 774—Summary Trial without Consent of Accused—Evidence—Admissibility—Articles Seized on Premises of Accused—Absence of Proper Warrant under secs. 641, 642.*

Under secs. 773 and 774 of the Criminal Code, as amended by 8 & 9 Edw. VII. ch. 9 (schedule), a Police Magistrate has the right to refuse to allow persons accused of keeping a disorderly house, that is to say, a common betting-house, to elect to be tried by a jury, and to try them summarily, without their consent.

Upon the trial of the accused, the Police Magistrate was right in admitting, as evidence against them, certain articles seized by police constables upon the premises of the accused, even though the entry of the constables upon the premises was without a proper warrant under secs. 641 and 642 of the Code, and a trespass.

CASE stated by George Taylor Denison, Esquire, Police Magistrate for the City of Toronto, as follows:—

“On the 28th February, 1912, John Honan and Thomas Honan were charged before me, upon an information charging that the said John Honan and Thomas Honan, in the month of February, 1912, at the City of Toronto, in the County of York, did, contrary to law, keep a common betting-house at No. 125 Jarvis street, contrary to sec. 227 of the Criminal Code; upon which charge the said accused asked leave to exercise their right to elect to be tried by a jury, which I refused, upon the ground that my jurisdiction to try the accused was absolute without their consent. The defendants thereupon pleaded ‘not guilty;’ and I thereupon proceeded to try them summarily upon the charge aforesaid.

“On the said 28th February, 1912, upon hearing the evidence submitted on behalf of the Crown—the accused not having given or tendered any evidence in their defence—I found them both ‘guilty’ of the offence with which they were charged, and I convicted them accordingly, and sentenced them each to pay a fine of \$10 and costs or to imprisonment for thirty days in the common gaol.

“Upon the arraignment of the accused before me on the said 28th February, they (by their counsel) submitted that they could exercise the right to elect to be tried by a jury upon the charge aforesaid, and stated that they desired to exercise such right and wished to be tried by a jury; but I ruled that the accused had not the right to elect to be tried by a jury, and that I had absolute

jurisdiction and right under secs. 227 and 228 and clause (f) of sec. 773 and sec. 774 of the Criminal Code to try the accused summarily without their consent; and I, accordingly, refused the accused the right to elect.

"Upon the trial of the said accused before me, there was tendered on behalf of the Crown evidence consisting of certain articles marked as exhibits 1, 2, 3, and 4, which are forwarded herewith, and are made part of this stated case, as evidence against the accused. The said exhibits, according to the evidence, had been seized, as it was alleged, under the provisions of sec. 641 of the Criminal Code, by certain police constables of the City of Toronto, who entered the premises of the accused; and the said exhibits were, under the provisions of secs. 641 and 642 of the Code, tendered as evidence against the accused upon the charge aforesaid; and I admitted the said exhibits as such evidence, against the objection of counsel for the accused that the provisions of secs. 641 and 642 had not been complied with.

"It appeared by the evidence that the chief constable of the City of Toronto, and also the deputy chief constable, were in the city on the 13th February, 1912 (the day upon which the police constables referred to in the next preceding paragraph entered the premises of the accused and seized the said exhibits), during the whole day, and acted in the performance of their duties, but that the seizure of the exhibits aforesaid was not made by them or under their direction, or by or under the direction of either of them, but was made by an inspector of police—a police constable named George Kennedy—or under his direction, neither the chief constable nor the deputy chief constable being present.

"Counsel for the accused objected to the admission of the said exhibits as evidence against the accused, upon the ground that my warrant or order purporting to authorise George Kennedy, police inspector, to act in the absence of the chief constable and deputy chief constable, was wrongfully and improvidently issued, in that the persons designated by the statute were not absent, as provided by the statute, and that the seizure of the articles marked as exhibits 1, 2, and 3, was not made by or under the direction of the chief constable or the deputy chief constable aforesaid, or of any other person authorised under sec. 641 of the Criminal Code to make such seizure; but I overruled this objection, and admitted the said exhibits as evidence against the accused.

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"At the request of counsel for the accused, I hereby reserve the following questions of law for the opinion of the Court of Appeal:—

"1. Had I the right to refuse to allow the accused to elect to be tried by a jury, and to try them summarily, without their consent?

"2. Had I the right, under the provisions of sec. 641, to authorise George Kennedy, a police inspector, to act in the absence of the chief constable and deputy chief constable, they being in the city attending to their ordinary police duties on the day of such authorisation and seizure?

"3. Was I right in admitting as evidence against the accused the exhibits hereinbefore mentioned so seized?

"The report in writing of the chief constable for the City of Toronto to me, the information and complaint before me, the warrant or order or authority issued by me pursuant to the said report, the conviction of the accused, and the evidence, including the said exhibits, are forwarded herewith and made part of this stated case."

The report of the chief constable, addressed to the Police Magistrate, was in these words: "I have the honour to report to you that there are good grounds for believing and I do believe that a building occupied by John Honan, in the City of Toronto, is kept or used as a common betting-place; and I hereby apply for authority to proceed against the said premises under secs. 641 and 642 of the Criminal Code."

The authority signed by the Police Magistrate was as follows: "I hereby authorise George Kennedy, police inspector of the City of Toronto deputed to act in the absence of the chief constable or deputy chief constable of said city, to enter the above-named premises and to proceed against the same under the provisions of secs. 641 and 642 of the Criminal Code."

George Kennedy, sworn as a witness at the trial of the accused, produced the articles marked as exhibits, referred to in the case, which, he deposed, were found on the person of John Honan and upon the premises. They were slips and racing forms and other papers apparently used for the purpose of recording bets.



Section 227 of the Criminal Code, R.S.C. 1906, ch. 146, defines a common betting-house.

Section 228, as amended by 8 & 9 Edw. VII. ch. 9 (schedule), provides: "Every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy-house, common gaming-house, common betting-house or opium joint, as hereinbefore defined."

Section 641: "If the chief constable or deputy chief constable of any city . . . or other officer authorised to act in his absence, reports in writing to . . . the Police . . . Magistrate . . . that there are good grounds for believing and that he does believe that any house, room or place within the said city . . . is kept or used as a common . . . betting-house, as defined in section . . . 227 . . . such . . . Police . . . Magistrate . . . may, by order in writing, authorise the chief constable, deputy chief constable, or other officer as aforesaid, to enter any such house . . . and to take into custody all persons who are found therein, and to seize . . . all tables and instruments of . . . betting . . . and to bring the same before the person issuing such order, or any Justice, to be by him dealt with according to law . . ."

Section 773, as amended by 8 & 9 Edw. VII. ch. 9 (schedule):—

"Whenever any person is charged before a magistrate,— . . .

"(f) with keeping a disorderly house under section 228 . . .

"the magistrate may, subject to the subsequent provisions of this Part, hear and determine the charge in a summary way."

Section 774, as amended by 8 & 9 Edw. VII. ch. 9 (schedule):—

"The jurisdiction of the magistrate is absolute in the case of any person charged with keeping a disorderly house, or with being an inmate or habitual frequenter of a common bawdy-house, and does not depend on the consent of the person charged to be tried by such magistrate, nor shall such person be asked if he consents to be so tried.

"2. The provisions of this Part do not affect any absolute summary jurisdiction given to Justices by any other Part of this Act."

May 14. The case was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and LENNOX, J.,

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*T. J. W. O'Connor*, for the defendants, argued that the Police Magistrate had not the right, under secs. 773 and 774 of the Code, to refuse the accused a trial by jury. Prior to the amendments made in 1909, this was settled by *Rex v. Lee Guey* (1907), 15 O.L.R. 235, following *The Queen v. France* (1898), 1 Can. Crim. Cas. 321; and the amendments in question do not give the magistrate the jurisdiction which he has claimed in this case. The magistrate had no right, under sec. 641, to authorise the inspector to seize the articles marked as exhibits, as the chief constable and his deputy were not "absent" within the meaning of the section; and, as the exhibits were illegally seized, the magistrate was not authorised to use them as evidence: Roscoe's Crim. Evid., 13th ed., pp. 195, 196; *The Queen v. Lushington, Ex p. Otto*, [1894] 1 Q.B. 420.

*J. R. Cartwright*, K.C., and *E. Bayly*, K.C., for the Crown, argued that the amendments to secs. 773 and 774, made by 8 & 9 Edw. VII. ch. 9, gave the magistrate the absolute jurisdiction which he had assumed, and that he had not erred in admitting the evidence in question: *Ex p. Cormier* (1909), 17 Can. Crim. Cas. 179.

June 18. The judgment of the Court was delivered by MEREDITH, J.A.:—The purpose of the amendments to secs. 773 and 774, made in the year 1909, was to make those sections applicable to such a case as this and others of the same character: to change the law in this respect from that which this Court had then recently, and a Quebec appellate Court had long before, held it to be, to that which in those cases it was contended for the Crown that it was: and the only question now is, whether Parliament has sufficiently expressed that purpose in the language used in making the amendments.

In the plainest words possible, it has made sec. 773 cover such a case as this; that is unquestionable; but it is urged that the change made in sec. 774 is not sufficient for that purpose. In that contention I am quite unable to agree.

Section 773 enumerates in detail the charges which a "magistrate" may hear and determine in a summary way; and plainly included in them is the charge in question in this case, which is described as keeping a disorderly house under sec. 228; and that

section, in plain terms, comprises any common bawdy-house, common gaming-house, or common betting-house, as in previous sections defined.

Then sec. 774 proceeds to make the jurisdiction of the magistrate, conferred upon him by sec. 773, "absolute" in the case of keeping a disorderly house; that is, in the case of keeping a disorderly house, as set out in the preceding section conferring the jurisdiction, that jurisdiction is to be absolute; and the remodelling of sec. 774, in respect of inmates and frequenters, makes it quite plain also that, in framing these amendments, due regard was had to that which was, in these respects, pointed out in the case of *Rex v. Lee Guey*, 15 O.L.R. 235, to which I have already adverted.

So that, in my opinion, the charge in this case is clearly one covered by sec. 774 as well as 773, as amended in the year 1909: 8 & 9 Edw. VII. ch. 9 (schedule); and, therefore, the "magistrate" had "absolute" jurisdiction.

Nor can I think that the magistrate erred in admitting the evidence objected to; the question is not, by what means was the evidence procured; but is, whether the things proved were evidence; and it is not contended that they were not; all that is urged is, that the evidence ought to have been rejected, because it was obtained by means of a trespass—as it is asserted—upon the property of the accused by the police officers engaged in this prosecution. The criminal who wields the "jimmy" or the bludgeon, or uses any other criminally unlawful means or methods, has no right to insist upon being met by the law only when in kid gloves or satin slippers; it is still quite permissible to "set a thief to catch a thief:" see *Rex v. White* (1908), 18 O.L.R. 640.

This disposes of the first and third questions adversely to the accused, and makes it unnecessary to consider the second; though I may add that, if magistrates will endeavour to give to the plain words of statutes their plain meaning, without letting that which may or may not suit their conveniences, or that which in their narrower environments may seem to be a better law, sway them, they will not find much difficulty in pursuing the right course.

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*Convictions affirmed.*

[IN CHAMBERS.]

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POWELL-REES LIMITED V. ANGLO-CANADIAN MORTGAGE  
CORPORATION.

June 8.  
June 19.

*Judgment Debtor—Company—Examination of Director as Officer—Con. Rule 902—Practice—Order for Examination—Subpœna—Loan Corporations Act—Incorporation of Company by Letters Patent—Power to Sue and be Sued—Effect of Non-registration—Provisions of Charter.*

For the purposes of Con. Rule 902, providing for the examination, by a creditor who has obtained a judgment against a corporation, of "any of the officers of such corporation," the word "officers" includes a director; and *held*, that R., who had been held out as president of a judgment debtor corporation, was a proper officer to examine under the Rule, touching the matters set out in the Rule.

*Seemle*, that an order for the examination of an officer of the corporation, under the Rule, is unnecessary.

Where the Master in Chambers had made an order (which had not issued) for the examination of R., a Judge in Chambers, upon appeal, substituted for it an order for the issue of a subpœna for the examination of R.

It was objected by R. that the judgment debtor corporation was non-existent as a company, and that the judgment was a nullity. By letters patent from the Crown (Province of Ontario) issued on the 29th November, 1910, R. and five other persons, and all such persons as should hereafter become shareholders, were constituted a body corporate under the provisions of the Loan Corporations Act, R.S.O. 1897, ch. 205, and amending Acts, "and (so long as the company stands duly registered in the terms of the said the Loan Corporations Act) capable of exercising all the functions of an incorporated company." The company was not registered:—

*Held*, that a body corporate was formed by the letters patent, and none the less so because it was not to exercise the functions of a loan company until it was registered; the body corporate could sue or be sued by its corporate name; the provision in the letters patent, apparently giving that power only so long as the company was registered, was not justified by the Act, and was wholly unnecessary; the power existed without any such provision; and, granted incorporation which was effective by the statute, there was no power to limit the effect thereof by a provision in the letters patent.

MOTION by the plaintiffs (judgment creditors) for an order, under Con. Rule 902\*, for the examination of one E. R. Reynolds as an officer of the defendant (judgment debtor), an incorporated company.

\*902. Where the judgment is against a corporation, the judgment creditor may in like manner examine any of the officers of such corporation, upon oath, before a Judge or other officer authorised to take an examination under Rule 900, touching the names and residences of the stockholders in the corporation, the amount and particulars of stock held or owned by each stockholder and the amount paid thereon, and as to what debts are owing to the said corporation, and as to the estate and effects of the corporation; and as to the disposal made by it of any property since contracting the debit or liability in respect of which the said judgment was obtained, or, in the case of a judgment for costs only, since the commencement of the cause or matter.



May 23. The motion was heard by Mr. James S. Cartwright, K.C., Master in Chambers.

*M. C. Cameron*, for the plaintiffs.

*John MacGregor*, for E. R. Reynolds.

June 8. THE MASTER:—After the motion to set aside the service of the writ of summons on Mr. Reynolds (3 O.W.N. 844), the plaintiffs signed judgment in default of appearance. They now move, under Con. Rule 902, for an order for the examination of Mr. Reynolds. He filed an affidavit to the same effect as on the previous motion, and was cross-examined. The motion was then argued.

The facts are the same as when judgment was signed. The defendant company has never been authorised to do business in this Province, because sufficient stock has not been subscribed and paid. But a charter was issued by the Lieutenant-Governor on the 29th November, 1910. In it Mr. Reynolds is the first-named of six elected provisional directors; and the head office of the company was fixed at Toronto.

It was also proved that in the prospectus issued by the company in England, and filed with the Provincial Secretary here, Mr. Reynolds is named as first of the Canadian directors, and is also called "president;" also the head offices are stated to be at 77 Victoria street, Toronto.

These facts seem sufficient to support an order for the examination of Mr. Reynolds; and an order may go if the plaintiffs still think it will be of any service to them. If they elect to proceed, costs will be reserved; if they take the other course, the motion will be dismissed without costs.

E. R. Reynolds appealed from the Master's order.

June 18. The appeal was heard by RIDDELL, J., in Chambers.

*John MacGregor*, for the appellant.

*M. C. Cameron*, for the plaintiffs.

June 19. RIDDELL, J.:—On the 29th November, 1910, letters patent issued constituting E. R. Reynolds and five other persons named "and all such persons as are or shall at any time hereafter become shareholders in the loan company hereby created under the provisions of the said Act a body corporate and politic with a

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perpetual succession and a common seal by the name of 'The Anglo-Canadian Mortgage Corporation,' and (so long as the company stands duly registered in the terms of the said the Loan Corporations Act) capable of exercising all the functions of an incorporated company . . . . Provided . . . . that if the said company is not registered in terms of the said Act, and does not go into actual operation within two years after incorporation . . . . such powers, except so far as necessary for winding up the company, shall *ipso facto* be forfeited . . . . and . . . . the charter of the said company may at any time be declared to be forfeited . . . . by an order . . . . in council . . . ."

The letters patent set out, in the preamble: "Whereas by the statute . . . . it is provided that the Lieutenant-Governor . . . . in Council may, by letters patent, grant a charter of incorporation to such persons as pursuant to the Loan Corporations Act have duly constituted themselves a provisional loan corporation and have elected from amongst themselves six persons as provisional directors thereof. And whereas by petition . . . . E. R. Reynolds" and the said five other persons named "provisional directors elected as hereinbefore mentioned have prayed that a charter may be granted to them . . . ."

The charter was procured by Reynolds, who is a barrister, and it is of course issued under R.S.O. 1897, ch. 205, and amending Acts.

As the company was, by the charter, capable of exercising the functions of a loan company only so long as it should stand duly registered, and as it could not procure registration until \$30,000 was paid into the company's treasury, and as this sum was not forthcoming, it was determined to advertise in England. Reynolds was over in England twice about it, and identifies an advertisement which contains a list of directors in Canada, amongst them E. R. Reynolds, Barrister-at Law, Toronto (President). There are four others named as directors in Canada, no one of them being named in the charter. As sec. 6 of the Act makes the provisional directors named in the declaration for incorporation *ipso facto* the first directors of the corporation, there must have been deliberate deceit in the English advertisement, or more has occurred in the way of "organising" the company than has been made to appear.

The advertisement does not seem to have been very successful, although it represents the company as "Incorporated by Letters Patent under the Loan Corporations Act of the Province of Ontario," etc., and sets out as directors in the United Kingdom one K.C.M.G., one Right Honourable Deputy-Lieutenant, and another gentleman, a director in a well-known insurance company.

Worse still, the advertising agents, the present plaintiffs, were not paid; and they sued the company in the English Courts and got judgment for over \$15,000 in February, 1912. Then they sued in Ontario upon this English judgment, and in March got judgment here for \$15,696.46 and \$19.60 costs. One proceeding in this action will be found reported in 3 O.W.N. 844. The plaintiffs, as judgment creditors, then applied under Con. Rule 902 for an order to examine Reynolds as to the estate and means of the debtor, etc., etc. The Master in Chambers on the 8th June made an order accordingly.

Reynolds now appeals.

What possible honest purpose can be served by refusing full disclosure about the affairs of this company, I have not been told, nor am I able to discover—but that is not the question I am to determine.

The main objection taken to this examination is, that the company is non-existent as a company, and the judgment is a nullity—it is to be noted that it is not the company which raises that objection, but Reynolds, who pretended to be its president when he was seeking money for it in England.

But there was a body corporate formed by the letters patent—none the less a body corporate because it was not to exercise the functions of a loan company until it was registered. A corporation has certain powers "necessarily and inseparably incident to every corporation;" and among them is the power "to sue or be sued, implead or be impleaded . . . by its corporate name:" Blackstone, vol. 1, p. 475; *cf. Conservators of the River Tone v. Ash* (1829), 10 B. & C. 349; *S.C.*, 8 L.J. K.B. O.S. 226. Of course, the paramount power of the Legislature may intervene and direct all actions for or against a corporation to be brought in some other name, as was the case, for example, in *Marsh v. Astoria Lodge* (1862), 27 Ill. 421; but there is nothing of that kind here.

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The provision in the charter which apparently gives the power to sue and be sued by its corporate name only so long as the company is registered, is not justified by the Act, and is wholly unnecessary. The power exists without any such provision; and, granted incorporation which is effective by the statute, there is no power to limit the effects of the same by a provision in the letters patent. It would be absurd, in my view, that, for example, the company could not, in its own name, sue a director or agent who had received a large sum of money on behalf of the company. There is nothing in this objection on principle. Nor does the case of *Simmons v. "Liberal Opinion" (Limited), Re Dunn* (1911), 27 Times L.R. 278, help: there there was no company, no corporation at all by that name: see *per* the Master of the Rolls, at p. 279, col. 2—"a non-existing corporation."

The other point is as to the position of Reynolds.

Under Con. Rule 902, the officers of a company may be examined, and this includes those who have been such officers: *Société Générale du Commerce et de l'Industrie en France v. Johann Maria Farina & Co.*, [1904] 1 K.B. 794.

Under Con. Rule 903, "any clerk or employee or former clerk or employé of the judgment debtor" may be examined; but such an examination requires an order.

The word "officer" is ambiguous—the meaning may and often does depend upon the context. Perhaps the strongest argument in favour of the appeal is to be found in sec. 94 of the Loan Corporations Act, R.S.O. 1897, ch. 205, directing the *directors* to appoint *officers*.

But, for the purposes of Con. Rule 902, that "officer" includes "director" is beyond doubt. In the case already referred to, in [1904] 1 K.B., a judgment had been recovered against a company, and an application was made under O. XLII., r. 32, for a person who had been a director of the company, but had ceased to be such, to attend to be examined as to the debts, etc. The difference between the English Rule and ours is pointed out in Holmested and Langton's *Judicature Act*, 3rd ed., p. 1138—and for the purpose of this case the difference is not of consequence.

It had already been said in *Attorney-General v. North Metropolitan Tramways Co.*, [1892] 3 Ch. 70, at p. 74, by North, J., that,



in an inquiry of a somewhat different character, "*primâ facie* the secretary is the best person" to interrogate. "But," he adds, "I quite admit that they are entitled to have information from such persons as can best give it with respect to the matters which are the proper subject for the interrogatories." Under the particular case he thought the traffic manager was not the proper person for the purpose: see also *Chaddock v. British South Africa Co.*, [1896] 2 Q.B. 153. In the case in [1904] 1 K.B., a person had been a director of the defendant company, but had ceased to be such. He disputed the right to examine him, on that ground. The Judge of first instance and the Court of Appeal both took it for granted that a director was an officer for the purpose of this Rule, and directed the witness to attend at his own expense to be examined.

In the present case, Reynolds was the person to take out the charter; he went to England twice in connection with the company's affairs; he was a director, who represented himself—or at least was represented—as the Canadian president; it is sworn and not denied that he purports and undertakes to act on behalf of the company, and within a few days back has stated that he was entering into a contract for the sale of the capital stock of the company; that he cabled instructions a few months ago to England either to pay the account in judgment in this action or to send the proceeds of the sale in England of the shares in the company's stock—he does not deny that he knows all about the property of the company—but contents himself with swearing that he never held himself out to the plaintiffs' solicitor as president of the company, and that, as the company was not licensed, it could have no president or officer. I presume that he was swearing or intending to swear to his opinion—if so, it were better left unsaid.

It is plain that Reynolds is a proper officer to examine under Con. Rule 902; and, had his objection been that no order was necessary for his examination, I think I should have given effect to such an objection—but his objection was not at all to the practice but to the right to examine him at all. It is not beyond the powers of the Court to order a subpoena to issue for service on an officer for examination under Con. Rule 902, however unnecessary such an order may be. The formal order of the Master in Chambers

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has not been drawn up—the proper order to make is that a subpœna (*duces tecum*, if desired) issue for the examination of Reynolds under Con. Rule 902. There will be no costs of the unnecessary application before the Master—Reynolds will pay the costs of the appeal forthwith after taxation thereof.

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[IN THE COURT OF APPEAL.]

REX v. COHEN.

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*Criminal Law—Indictment—Amendment—Jurisdiction—Offence of Different Nature—Obtaining Money by False Pretences—Obtaining Credit by False Pretences—Criminal Code, secs. 405, 405A, 1019—Grand Jury—Substantial Wrong or Miscarriage.*

The defendant was charged with the offence of obtaining *money* by false pretences, contrary to sec. 405 of the Criminal Code, and a true bill was found against him by the grand jury. In the course of the trial, the Judge amended the indictment so as to make it one of obtaining *credit* by false pretences, contrary to sec. 405A; and the defendant was found "guilty:"—*Held*, that the two charges were not substantially for an offence of the same kind; having regard to *Regina v. Boyd* (1896), Q.R. 5 Q.B. 1, and the amendment of the Criminal Code by 7 & 8 Edw. VII. ch. 18, sec. 6, adding sec. 405A, the amended charge was not one coming within the provisions of sec. 405, or of the same nature, so as to justify the amendment; and there was no jurisdiction to try the defendant upon the new indictment; it was his right to have that charge first dealt with by a grand jury; and not to be put in jeopardy without their consent; and so some substantial wrong or miscarriage occurred at the trial, excluding resort to sec. 1019 of the Criminal Code to sustain the conviction.

CASE stated by J. H. Denton, Esquire, one of the Junior Judges of the County Court of the County of York, presiding as Chairman at the General Sessions of the Peace, as follows:—

"On the 20th and 21st days of March, 1912, the prisoner was tried at the General Sessions of the Peace for the County of York on an indictment which, before amendment, read as follows: 'That Harry Cohen, at the City of Toronto, in the County of York, on or about the month of February, 1909, did, knowingly and fraudulently by false pretences, obtain from the Northern Crown Bank five thousand dollars, with intent to defraud the said Northern Crown Bank, contrary to the Criminal Code.'

"The evidence for the Crown developed the following state of facts.

"A joint stock company, known as 'The National Metzo and Biscuit Company Limited,' was incorporated and organised and began to do business in Toronto in the year 1907, the main object of the company being to manufacture and sell what is known as 'Passover' bread and biscuits, consumed by Hebrew people generally.

"The prisoner, his father, brother, and two others, were the directors of the company, which commenced to do business—

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with the Agnes Street branch of the Northern Crown Bank, in the autumn of the year 1907. The manager of the company was one Weinstock, and the manager of the Agnes Street branch of the Northern Crown Bank was one Gurofsky.

“On the 28th January, 1909, the position of the company with the bank was as follows. The company owed the bank \$3,000 on the note of the company, under discount, and \$1,124.41, the amount of an overdraft, and there was an indirect liability on customers’ paper, under discount, of \$548. The bank asked for a settlement or readjustment of the account. On the 28th January, 1909, Gurofsky wrote to the head office of the bank, pointing out the condition of the company, and asked for the company a line of credit of \$10,000, consisting of \$5,000 on its own note and \$5,000 on trade paper, the whole to be guaranteed by the directors, of whom the prisoner was one.

“On the 3rd February, 1909, the directors of the bank considered the application, and decided to decline it until a statement of the affairs of the guarantors was presented.

“On the 8th February, 1909, the prisoner signed a statement of his affairs, shewing a surplus of \$11,500, which, as a matter of fact, was untrue, in that no mention was made of a liability of \$2,200 to his second cousin, to whom, about four months afterwards, he conveyed the real estate referred to in the statement. This statement of affairs, signed by the prisoner, together with statements signed by the other directors of the company, was forwarded by Gurofsky to the head office of his bank; and on the 9th February, 1909, the directors of the bank met, and the application for a credit of \$10,000—\$5,000 on the company’s own name and \$5,000 on trade paper—was granted, on the understanding that the direct loans be increased to \$5,000 only, with the guarantors suggested. Shortly after this, a document called ‘the guarantee’ was signed by the prisoner and his co-directors, and the credit of the company (in addition to the credit on trade paper) was increased from \$3,000 to \$5,000.

“At the close of the Crown’s case, counsel for the prisoner contended that the evidence, at most, disclosed a case of obtaining *credit* by false pretences; and that, as credit was something incapable of being stolen, the prisoner could not be found guilty upon the charge of obtaining money by false pretences.



"I gave effect to that objection; but, it appearing to me that the prisoner would not be misled or prejudiced in his defence by an amendment of the indictment to make it conform with the evidence adduced, I did, for reasons which appear in the evidence at the close of the Crown's case, amend the indictment to read as follows: 'That Harry Cohen, at the City of Toronto, in the County of York, on or about the month of February, 1909, did, in incurring a debt or liability to the Northern Crown Bank of Canada, obtain credit from the said bank under false pretences, contrary to the Criminal Code.'

"Upon such amended indictment the trial proceeded, and the jury found the prisoner 'guilty.'

"The prisoner's counsel asked for a stated case on the question of law as to my power to make the amendment in question. This request was granted, sentence was postponed, and the prisoner admitted to bail.

"The indictment and the evidence taken at the trial, together with the exhibits, are forwarded herewith and made part of this case.

"I reserve the following question for the opinion of the Court of Appeal:—

"Had I the power to amend the indictment at the time and in the manner stated?"

May 13 and 14. The case was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and LENNOX, J.

*T. C. Robinette*, K.C., for the defendant, argued that the learned trial Judge had no power to amend the indictment, which charged an offence under sec. 405\* of the Criminal Code, R.S.C. 1906, ch. 146, so as to make it charge an offence under sec. 405A†; and referred to *Regina v. Norton* (1886), 16 Cox C.C. 59; *Rex v. Wheatly* (1761), 2 Burr. 1125; *Regina v. James* (1871), 12 Cox C.C. 127, the last-named case being very similar

\* 405. Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud, by any false pretence, either directly or through the medium of any contract obtained by such false pretence, obtains anything capable of being stolen, or procures anything capable of being stolen to be delivered to any other person than himself.

† Added by 7 & 8 Edw. VII. ch. 18, sec. 6, reading: 405A. Every one is guilty of an indictable offence and liable to one year's imprisonment who, in incurring any debt or liability, obtains credit under false pretences, or by means of any fraud.

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to the case at bar. The Judge should have dismissed the case, following *Regina v. Boyd* (1896), Q.R. 5 Q.B. 1.

*J. R. Cartwright*, K.C., and *E. Bayly*, K.C., for the Crown, argued that secs. 405 and 405A must be read together; and that the amendment of the indictment was within the powers of the trial Judge, under secs. 889 and 890 of the Code, which are more general and unrestricted than the powers of the Court under the English statutes, and the Canadian Acts prior to the Code. [LENNOX, J., referred to *The Queen v. Weir* (No. 3) (1899), 3 Can. Crim. Cas. 262, as to the point whether or not the amendment would render a different plea necessary.] The cases are collected in Russell on Crimes, Canadian ed., p. 1971 *et seq.*—see especially note (m) on p. 1974, where the principle to be followed in such cases is laid down by Byles, J. It is true that, if the present case arose in England, *The King v. Benson*, [1908] 2 K.B. 270, would be conclusive against the Crown; but a different rule applies here. There has been no substantial miscarriage of justice, and the crime of which the defendant has been convicted is not a different crime from that for which he was originally indicted, but the same crime with a different face. Reference was made to Taylor on Evidence, 10th ed., sec. 253; *Cooke v. Stratford* (1844), 13 M. & W. 379, 387.

*Robinette*, in reply, argued that no amendment could be made which altered the nature or quality of an offence, and referred to *Regina v. Wright* (1860), 2 F. & F. 320, *per Hill, J.*, at p. 325; *Regina v. Bailey* (1852), 6 Cox C.C. 29.

June 18. MACLAREN, J.A.:—The defendant was indicted at the General Sessions, Toronto, for having, knowingly and fraudulently by false pretences, obtained from the Northern Crown Bank five thousand dollars, with intent to defraud the said bank; and the grand jury returned a true bill against him.

During the trial, at the close of the case for the Crown, the defendant's counsel took the objection that the offence charged in the indictment had not been made out; that sec. 405 of the Criminal Code, under which the charge was laid, required that the accused must have obtained something capable of being stolen; whereas, according to the evidence for the Crown, the most that had been obtained from the bank in this case was a line of credit for a joint stock company, of which the defendant

was a director, and credit was something that could not be stolen Counsel relied upon a decision of the Quebec Court of Appeal: *Regina v. Boyd*, Q.R. 5 Q.B. 1.

The County Court Judge held that the objection was well taken; but that the indictment might be amended by striking out the words charging the defendant with obtaining the \$5,000, and substituting a charge under sec. 405A of the Code that, "in incurring a debt or liability to the Northern Crown Bank, he obtained credit from the said bank under false pretences," and the indictment was so amended. This section, 405A, was added to the Code in 1907 by 7 & 8 Edw. VII. ch. 18, sec. 6, to supply the defect in the law pointed out in the *Boyd* case.

The trial proceeded on the amended indictment, and the jury found the defendant "guilty". At the request of counsel for the defence, the Judge reserved for this Court the following question: "Had I the power to amend the indictment at the time and in the manner stated?"

The law as to the amendment of an indictment in a case like the present is found in sec. 889 of the Code, which provides: "If on the trial of any indictment there appears to be a variance between the evidence given and the charge in any count in the indictment . . . the Court before which the case is tried may, if of opinion that the accused has not been misled or prejudiced in his defence by such variance, amend the indictment or any count in it or any . . . particular so as to make it conformable with the proof." Section 890 (3) provides: "The propriety of making or refusing to make any such amendment shall be deemed a question for the Court, and the decision of the Court upon it may be reserved for the Court of Appeal, or may be brought before the Court of Appeal by appeal like any other question of law."

Section 889, above quoted, was first enacted in the Criminal Code of 1892, as sec. 723. Although it has been in force for nearly twenty years, and has been largely used, we were not referred at the argument to a single reported case in which it has been construed by any Court. The corresponding provision in the English criminal law is very different, so that we do not find any direct authority there. It is sec. 1 of 14 & 15 Vict.

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ch. 100, and enumerates a list of amendments that may be made, such as variances in the names of places, persons, owners of property, etc., or in the name or description of any matter or thing named or described in the indictment. Our own law before 1892 was not unlike the English, and is to be found in R.S.C. 1886, ch. 174, sec. 238, where any variance in "names, dates, places or other matters or circumstances . . . not material to the merits of the case, and by the misstatement whereof the person on trial cannot be prejudiced in his defence on such merits," may be amended by the Court. This was taken from the Criminal Procedure Act of 1869, which was practically an adaptation of the English statute of 1851.

There are two reported cases in which amendments under sec. 889 of the Code (then sec. 723) were discussed and upheld. The first is *Regina v. Patterson* (1895), 26 O.R. 656, where an indictment was laid for obtaining two cheques by false pretences, the false pretence being "that there was then a large quantity of beans, to wit, 2,680 bushels of beans," in a certain warehouse. The words, "a large quantity of beans, to wit," were struck out of the indictment, and the prisoner was convicted. A Divisional Court upheld the conviction, and held that the indictment as amended was substantially the same as the one on which the grand jury found a true bill. It was pointed out that the Code did not require the indictment to state in what the false pretence consisted.

The other is a Montreal case, *The Queen v. Weir* (No. 3), 3 Can. Crim. Cas. 262, where an indictment for making false returns under the Bank Act was amended by inserting the word "containing" before the words "a wilful, false, and deceptive statement," etc. Wurtele, J., said, at p. 268: "The correction in no way changes the character or nature of the offence, and as the defendant knew to the same extent before and after the amendment what he was accused of, he was neither misled nor prejudiced by it. . . . In fine, if the transaction is not altered by the amendment, but remains precisely the same, the amendment ought to be allowed; but, if the amendment would substitute a different transaction from that alleged, or would render a different plea necessary, it ought not to be made."

Although secs. 405 and 405A both relate to false pretences,



yet they differ. The former relates exclusively to obtaining money, chattels, etc., something "capable of being stolen," the latter exclusively to the obtaining of credit; the punishment in the former case may be three years' imprisonment, in the latter the maximum is one year; the former is an adaptation of sec. 86 of the English Larceny Act; the latter is derived from sec. 13 of the English Debtors Act, 1869 (32 & 33 Vict. ch. 62).

If the amendment had been simply the substitution of another article capable of being stolen, as, for instance, the substitution of promissory notes or other valuable securities for the "five thousand dollars," the transaction being the same as that disclosed in the preliminary examination, to use the language of Wurtele, J., it would seem to me that the amendment might have been upheld.

Another question of importance is, whether the defendant was not deprived of his right to have the grand jury pass upon his case. It may be argued that the grand jury have not found a true bill against him for the offence for which he was tried. The formula by which the grand jury give their assent to the bill reported by their foreman is, that they are content that the Court shall amend any matter of form in the indictment, altering no matter of substance without their privity. May it not be said to be a matter of substance, and not of form, to substitute what may be said to be a different offence, expressed in different terms, under a different section, and with a different punishment?

It was also argued that evidence was put in by the Crown that was admissible under the indictment before the amendment, but which would have been inadmissible under the amended indictment, and that the defendant was prejudiced thereby. Particulars of these were not given. If correct, it would, no doubt, be a serious matter. However, I do not wish to base my decision on this.

On the whole, I am of the opinion, for the foregoing reasons, that the trial Judge had not the power to amend the indictment at the time and in the manner stated, and that the question reserved by him should be answered in the negative.

GARROW, J.A.:—I concur.

MEREDITH, J.A.:—It is not necessary to consider whether the

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defendant could have been convicted of the offence of obtaining money by false pretences, because he was not tried upon that charge, but was tried upon the charge, recently made by statute a criminal offence, of obtaining credit by false pretences; but I may add that, where one procures another to do that which is tantamount to paying over a sum of money by false pretences, it is at least getting very near the offence; even though the transaction is completed by that which is tantamount to an immediate deposit of the money by the person obtaining it with the person from whom it is obtained, subject to the order of the person obtaining it.

The question here is one very different from that, however; it is, whether the change of an indictment from one of obtaining money to one of obtaining credit by false pretences is an amendment which the law permits; and that question is solved, in my opinion, when the question whether the two charges are substantially for an offence of the same kind is truly answered. If the charge were of obtaining one thing capable of being stolen, within the meaning of sec. 405 of the Criminal Code, and the change were to something else of the same nature, the amendment might well be made; whether it ought to be would, of course, be another question. But, wide as the power of amendment is, it cannot comprehend a change from an offence of one nature to one of another; and, in my opinion, having regard to the case *Regina v. Boyd*, Q.R. 5 Q.B. 1, and the subsequent enactment of sec. 405A as an addition to the Criminal Code, this case should be looked at as if, before that enactment, the thing with which the defendant was charged was not one coming within the provisions of sec. 405, or of the same nature, so as to justify the amendment of the indictment which was made in this case: see *The King v. Benson*, [1908] 2 K.B. 270, and *Rex v. Corrigan* (1909), 20 O.L.R. 99.

If it were not, then there was no jurisdiction to try the defendant upon the new indictment; it was his right to have that charge first dealt with by a grand jury; and not to be put in jeopardy without their consent; and so some substantial wrong or miscarriage occurred at the trial, excluding the resort of the Crown to sec. 1019 of the Criminal Code to sustain the conviction: see *The King v. Bates*, [1911] 1 K.B. 964.

I would answer the question reserved in the negative, and direct that the conviction be quashed, and that the accused be discharged in respect of this conviction.

MAGEE, J.A.:—The original charge of obtaining money by false pretences was framed under sec. 404 of the Criminal Code, 1906, which makes it an indictable offence to obtain, with intent to defraud, by false pretences, anything capable of being stolen. The punishment therefor is three years' imprisonment. The amended charge is framed under sec. 405A, which was added to the Code in 1907 by 7 & 8 Edw. VII. ch. 18, sec. 6, and which makes guilty of an indictable offence and liable to one year's imprisonment every one who, in incurring any debt or liability, obtains credit under false pretences or by means of any fraud. This section was, no doubt, added in consequence of the decision in *Regina v. Boyd*, 4 Can. Crim. Cas. 219, Q.R. 5 Q.B. 1, that obtaining credit merely did not come within sec. 405, as credit was not a thing capable of being stolen. It is taken from the Imperial Debtors Act, 1869, 32 & 33 Vict. ch. 62, sec. 13, where, however, the words are "under false pretences or by means of any other fraud." The English statutes relating to amendments in criminal proceedings are referred to in Halsbury's Laws of England, vol. 9, p. 344. Their effect was considered in *The King v. Benson*, [1908] 2 K.B. 270, which somewhat resembles this case. The indictment contained two counts, framed under the sections corresponding to our secs. 405 and 405A. Both counts alleged specific false pretences. The Chairman of Quarter Sessions considered that the accused had not obtained the goods (board) or credit by the false pretences alleged (of being engaged to work), but on the faith of a promise to pay on a specified day; and he struck out the first count and amended the second so as to charge that by means of fraud the accused incurred a debt in the purchase of goods. It is obvious that this amendment still left the charge in the second count one under the same section—that is, our sec. 405A. The prisoner was convicted, but, on a case being stated, the five Judges agreed that, although the Criminal Procedure Act, 1851 (14 & 15 Vict. ch. 100), sec. 1, allows amendment "in the name or description of any matter or thing," there was "no power to make an amendment substi-

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tuting one offence for another." Lord Alverstone, C.J., in delivering the judgment of the Court, said: "If the Legislature had intended that one offence might be substituted for another, it would not have used language similar to that under which it allows an amendment to be made with regard to some variance in the ownership of property named or described in the indictment. The procedure in a criminal trial assumes that the bill of indictment has gone before the grand jury and that they have returned a true bill. To allow an amendment to be made substituting a fresh offence might have the effect of placing a prisoner upon his trial for an offence that had never been before the grand jury. The fact that the evidence may be the same to establish both cases is immaterial." He referred to the decision in *Regina v. Jones*, [1898] 1 Q.B. 119, as shewing that a person may be convicted of obtaining credit by means of fraud within the meaning of the Debtors Act, 1869, sec. 13, although he has made no false pretence.

The provisions of our Criminal Code, 1906, as to amendment, are wider than the English Acts. Under sec. 889 (1), "if . . . there appears to be a variance between the evidence given and the charge in any count," the Court may amend if of opinion that the accused has not been misled or prejudiced in his defence; and (2), if the indictment has been preferred under some other Act, instead of under the Code, or the converse, or if it appears that there is an omission to state or a defective statement of anything requisite to constitute the offence, or an omission to negative any exception which ought to have been negated, but that the matter omitted is proved by the evidence, the Court may likewise amend. This was inserted in the Criminal Code of 1892, as sec. 723. Previously the provisions for amendment, R.S.C. 1886, ch. 174, secs. 237, 238, allowed amendments "in names, dates, places, or other matters or circumstances therein mentioned, not material to the merits of the case."

The present section, 889, applies to a variance "between the evidence given and the charge in any count." This cannot fairly be interpreted to authorise the change to an entirely different charge from that in the count, but only to authorise the retention in substance of the same charge, though amending it in details so as to conform to the evidence. So long as an accused



person is entitled to trial by jury, and every criminal accusation so to be tried is to be first passed upon by a grand jury, the basis upon which amendments should be made appears to me to be that stated by Lord Alverstone, as already quoted, and is expressed in effect by the formula of the grand jury, which gives its consent "that the Court may amend matters of form, altering no matter of substance in this bill." Here it is a matter of such substance which is altered that the offence sought to be charged by the amendment had been held in *Regina v. Boyd* not to be one punishable under an indictment such as this was when assented to by the grand jury. Such a charge has, therefore, not been authorised by them. It is an offence under another and later provision of the law and not subject to the same punishment.

It is true that, even before the Acts allowing amendments in England, a man might be charged with an offence for which he would be liable to one punishment and be convicted only of a less offence for which the punishment might not be the same, but that was because the minor charge was included in the greater, and thus was, in fact, stated in the indictment and approved by the grand jury. Here there was no such inclusion.

It is evident from the second sub-section of sec. 889 that there no change from one offence to another is intended, but that the substance of the charge which the accused has to meet must remain the same. Such, also, is, in my opinion, the effect of the first sub-section.

The power of amendment under sec. 898, when objection is taken to any indictment for "any defect apparent on the face thereof," allows the Court to cause it to be "amended in such particular;" and yet it has been held that "matters of substance cannot be (so) amended, and essential allegations which have been entirely omitted cannot be added by the Court:" *The Queen v. Weir* (No. 5) (1900), 3 Can. Crim. Cas. 499, 503; *The Queen v. Cameron* (1898), 2 Can. Crim. Cas. 173. Until Parliament expressly authorises such interference with the work of the grand jury, it would be very unsafe to allow such change as this under the guise of amendment, and I do not think it

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was authorised. I would, therefore, answer the question in the negative.

I express no opinion as to whether the accused should have been convicted under the original indictment. Section 405 draws a distinction between obtaining property and procuring it to be delivered to another. As to the amended charge, it is noticeable that the written representation was on the 8th February; the guarantee upon which the accused became liable is dated the 18th February; and the additional credit to the joint stock company by the discount of the \$2,000 note had been given on the 8th February; and the manager of the bank appears to think it was only to take up a note on which credit therefor had previously been given.

LENNOX, J., concurred.

*Conviction quashed.*

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[IN THE COURT OF APPEAL.]

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*Lunatic—Inquiry under Lunacy Act, sec. 7—Finding by Trial Judge—Reversal by Divisional Court—New Evidence—Retrial—Re-examination of Supposed Lunatic—Judgment as by Court of First Instance—Com. Rule 498—Powers of Court—Further Appeal to Court of Appeal—New Trial—1 Geo. V. ch. 20—Application to Pending Inquiry.*

*Held*, reversing the judgment of a Divisional Court, 24 O.L.R. 222, which reversed the judgment of BRITTON, J., finding an issue as to lunacy in favour of M. F., the supposed lunatic, that that Court had no power to take the course it did, namely, to open up the case, hear fresh evidence, and determine the issue as if a Court of first instance; nor had the Divisional Court the power, given to the trial Judge by sec. 7(4) of the Lunacy Act, to examine M. F.

*Held*, also, that, in the circumstances, the Court of Appeal, instead of determining the case upon the evidence which was before the trial Judge, should do what the Divisional Court might have done—that is, direct a new trial.

*Per* MEREDITH, J.A., dissenting, that the course taken by the Divisional Court was proper, and its determination that M. F. was of unsound mind and unable to manage himself or his affairs was warranted by the evidence taken.

*Per* MEREDITH, J.A., also, that the provisions of 1 Geo. V. ch. 20, passed after the judgment of the trial Judge, but before the additional evidence was taken by the Divisional Court, were applicable to the case.

APPEAL by Michael Fraser from the order of a Divisional Court, 24 O.L.R. 222.

November 29 and 30 and December 1 and 4, 1911. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

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*G. H. Watson, K.C., John King, K.C., and F. W. Grant*, for the appellant. The Divisional Court acted in excess of its proper discretion and jurisdiction in opening up and practically re-trying the case, as it did. The judgment of the trial Judge was based upon a full and accurate view of the law and a careful analysis of the evidence; and it was not shewn that anything was omitted at the trial that should have been taken into consideration. The Court below erred in going outside of the question properly before it as to whether the appellant was of unsound mind or not, and in going far beyond that issue into a general and widely extended investigation of the manner in which his business affairs had been managed. Con. Rule 498, on which the respondent relies, does not authorise the admission of such further evidence as was taken in this case, except upon special grounds, and with the special leave of the Court; and there is no precedent to be found for the extraordinary action which has been taken by the Divisional Court. *Dodge v. Smith* (1902-3), 1 O.W.R. 803, 2 O.W.R. 561, in this Court, went rather far, but has no resemblance to the present case, as it dealt with letters that were discovered after judgment. Counsel referred to a number of the cases cited on this point in the argument before the Divisional Court, 24 O.L.R. at pp. 240, 241, and also to *Burfoot v. DuMoulin* (1891), 21 O.R. 583; *Murray v. Canada Central R.W. Co.* (1882), 7 A.R. 646, 655; *Dinsmore v. Shackleton* (1876), 26 C.P. 604. In any event, the Court below should have been guided by the report of Dr. Caven, the professional expert appointed by itself during the course of the appeal, which was clearly in favour of the appellant. The Divisional Court also erred in directing a personal examination of the appellant by itself, as that is something which, under the statute, is permitted only to the trial Judge. If a different rule were to prevail, it would be open to the Judge of the higher appellate Courts to make similar examinations, and the result is in effect a conflict of judicial testimony. On the question of jurisdiction, they referred to *In re Enoch and Zaretzky Bock & Co.'s Arbitration*, [1910] 1 K.B. 327 (in which *Coulson v. Disborough*, [1894] 2 Q.B. 316, is commented on), especially to the

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judgment of Fletcher Moulton, L.J., and to that of Farwell, L.J., at pp. 335-337. This is not a mere matter of discretion, but one of excess of jurisdiction; and, in any event, there has been an excess of judicial discretion. It is evident that the Court below was largely influenced in coming to its decision by collateral circumstances relating to the marriage of the appellant and other matters of that kind, which had no relevance to the real issue. As to the weight to be attached to such circumstances, see *Cornwall v. Cornwall* (1908), 12 O.W.R. 552. There was no authority for the action of the Divisional Court either under the Judicature Act or the Lunacy Act, under the latter of which the judgment of the trial Judge can be set aside only by the judgment of a Court of appeal sitting as such. The irregularity of the course followed by the Court below is clearly shewn by the case of *Kessowji Issur v. Great Indian Peninsula R.W. Co.* (1907), 96 L.T.R. 859, before the Privy Council. The temporary lapses of memory on the part of the appellant are consistent with normal senility, and any confusion of mind shewn by him would be the natural result of his feeling of depression and resentment. He had peculiarities and eccentricities, but not such as amounted to mental unsoundness.

A. E. H. Creswicke, K.C., and A. McLean Macdonell, K.C., for the respondent. The Judges in the Court below were amply justified in their action under Con. Rule 498, which is practically the same as the English Rule: *In re Neath Harbour Smelting and Rolling Works* (1885), 2 Times L.R. 94; *In re National Debenture and Assets Corporation*, [1891] 2 Ch. 505, 516; *Shoe Machinery Co. v. Cutlan*, [1896] 1 Ch. 108, 114, *per* Rigby, L.J. The *Kessowji* case, on which great stress is laid by the appellant, is distinguishable from the case at bar because the Rules there applicable shew that the decision of the trial Judge as to the admission of new evidence was final, and the appellate Court had no power to reverse it. It was a mere matter of accommodating themselves to the convenience of the appellant for the members of the Divisional Court to go to Midland, as they had a right to require him to appear personally before them: Pope on Lunacy, ed. of 1877, p. 65; *In re Roberts* (1746), 3 Atk. 308, 312. It cannot be doubted that, if the learned trial Judge had had all the facts put before him which were elicited by the examination of witnesses and of the



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appellant himself, shewing the utterly reckless and improvident disposition made by him of his property, and his general weakness and unsoundness of mind, the same conclusion would have been arrived at by him as by the Judges of the Divisional Court. The facts so elicited shewed that the appellant was either a senile dement with a diseased mind, or that he was at all events so unsound in mind as to be utterly incapable of looking after his own affairs. In either case the Court below was justified in the conclusion to which it came: *Ridgeway v. Darwin* (1802), 8 Ves. 65. "Opinion evidence" as to the sanity of the appellant can be given only by the qualified experts called on each side, and no weight is to be attached to the opinion of other witnesses, even though some of them may be medical men: *Regina v. Neville* (1837), Crawford & Dix's Notes of Cases 96, 97; *Carter v. Boehm* (1766), 3 Burr. 1905. The expert medical evidence is fully discussed in the judgment of Middleton, J., 24 O.L.R. at p. 273 *et seq.*, on whose conclusions the respondent relies. The course taken by the Court below is justified by the wide language of Con. Rule 498, which gives the appellate Court "all the powers and duties as to amendment *and otherwise*" of the Court appealed from, where the word "and" is disjunctive, and not merely "powers" but "duties" are included within the scope of the Rule. The following authorities were also referred to: *Quilter v. Mapleson* (1882), 9 Q.B.D. 672; *Skinner & Co. v. Shew & Co.*, [1893] 1 Ch. 413; *Shelford v. Louth and East Coast R.W. Co.* (1879), 4 Ex.D. 317. They also relied upon the cases and reasons set forth in the argument before the Divisional Court, 24 O.L.R. at pp. 238, 239.

*Watson*, in reply, referred to the type-written appeal case in *Cornwall v. Cornwall*, *supra*, at pp. 589, 628, 630, which was a stronger case against the appellant than this, as to alleged delusions and the transfer of property. No opportunity has been given to the appellant to rebut the inferences that might be drawn from some of his statements, made as they were under the forced and unnatural conditions that obtained at the time of the visit of the Divisional Court. As to jurisdiction, we do not say that the Court below had no power to receive new evidence, but that in its acting as it had done in this case, there was an absence or an excess of judicial discretion. The action so taken was the

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beginning, and, it was to be hoped, would be the end, of an unprecedented chapter in judicial procedure.

June 18. Moss, C.J.O.:—This is an appeal by Michael Fraser from an order of a Divisional Court, reversing an order pronounced by Britton, J., after the trial by him of an issue, the question to be determined being whether or not Michael Fraser was, at the time of the inquiry, of unsound mind and incapable of managing himself or his affairs.

After a trial extending over four days, during which eleven witnesses in support of the affirmative and ten in support of the negative of the issue were called and examined, and after a personal interview with and examination of Michael Fraser at his home in Midland, the learned trial Judge determined and adjudged that Michael Fraser was not, at the time of the said inquiry, of unsound mind and incapable of managing himself or his affairs.

From this finding and adjudication an appeal was taken by Catherine McCormick, the promoter of the proceeding, with the result already stated.

Upon the appeal from the order of the Divisional Court, there arose some important and to some extent novel questions, owing to the course into which the case was turned, the shape it was caused to assume, and the manner in which it was finally dealt with by the Divisional Court upon the appeal to it. The Divisional Court did not dispose of the appeal upon the record as it came before it from the trial Court. While the argument was in progress, it, apparently on its own motion, without any application on the part of the then appellant or any notice of intention on her behalf to make an application, and against objection on behalf of Fraser, directed that the evidence of further witnesses be taken before it. Under this direction, eleven witnesses testified before the Court, all but one of whom had not testified before the trial Judge. The Court also appointed one of these witnesses, a medical practitioner, to make a special personal examination and inquiry into the mental condition and capacity of Michael Fraser and report his conclusions. In addition, the Judges constituting the Court made a special visit to Fraser's home, and themselves questioned him, the interview lasting, it is said, about two hours.

Upon the record thus procured, more than upon the original record, the argument was resumed and concluded. So that, as stated by Middleton, J. (24 O.L.R. at p. 266): "Originally an appeal, the hearing was reopened, and the matter fell to be dealt with by us upon the original evidence and the new evidence, and upon this we are called upon to pronounce, not as upon an appeal, but as in the first instance—and if, in the result, we differ from the learned trial Judge, we are not reviewing him but are arriving at a different conclusion upon widely different evidence."

It is quite apparent from the opinions of the learned Judges that, on finally disposing of the case, the Court proceeded almost entirely upon the material which was not part of the record when the appeal was taken from the decision of the learned trial Judge.

The first, and indeed the main and most important question, is, whether it was competent for the Divisional Court as an appellate tribunal to deal with the case as it has been dealt with, and whether the now appellant, Michael Fraser, is bound by its action in this regard.

The serious consequences to him of what has been done are very apparent; for, whereas upon the case as appearing on the record when the appeal was taken he had been found and adjudged not to be of unsound mind and incapable of managing himself or his affairs, he has now a decision to the contrary against him, based not upon appeal from that finding and adjudication, but upon a trial and inquiry conducted by a new and different tribunal.

The action of the Divisional Court is sought to be upheld, first, upon the ground that, under the Lunacy Act, 9 Edw. VII. ch. 37, and the Con. Rules with respect to appeals, there was jurisdiction; and, secondly, that, having regard to the nature of the inquiry and to the inherent as well as statutory jurisdiction of the Court over the persons and estates of lunatics or persons of unsound mind and incapable of managing themselves or their affairs, it is not only within the powers of the Court, but it is its imperative duty, to adopt methods of investigation and prescribe rules of procedure which in a case of ordinary litigation between subjects could not and would not be permitted. With great deference, I am unable to subscribe to either of these propositions.

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It is, of course, beyond dispute that the Court, either as the inheritor or statutory delegate of the powers, jurisdiction, and duty of the King as *parens patriæ*, or as the instrument of the Legislature for the care and protection of the persons and estates of lunatics or persons of unsound mind as defined by the Lunacy Act, possesses most extensive powers, jurisdiction, and authority in regard to such matters.

But the exercise of these powers or the right to exercise them is based, not upon the allegation of any one, not even of the Crown or of the Attorney-General as representing the Crown, that a person is a lunatic or of unsound mind and incapable of managing himself or his affairs, but upon a finding and adjudication after due inquiry that such is the case. The inquiry into that question is to be conducted in the same manner and according to the same rules of law and procedure as any other trial where a trial is to take place.

So far as the matter is governed by statute, it is quite clear that the first preliminary to the assumption by the Court of the powers, jurisdiction, and authority specified in sec. 3 of the Lunacy Act, is a finding and adjudication in some form and a declaration by the Court that the person in regard to whom application is made is a lunatic. Under sec. 6, that declaration may in some cases be made without the trial of an issue. But when, under sec. 7, the Court directs an issue to try the alleged lunacy, the directions as to the mode of trial and the practice and procedure to be observed are specific. It is expressly declared that the practice and procedure as to the preparation, entry for trial and trial of the issue and all the proceedings incidental thereto shall be the same as in the case of any other issue directed by the Court or Judge (sub-sec. 6). By sub-sec. 7, the same (no higher or different) right of appeal may be exercised by any party to the issue as may be exercised by a party to an action in the High Court, and the Court hearing the appeal has the same (and no higher or different) powers as upon an appeal from a judgment entered at or after the trial.

It is plain that the statute confers upon the Court no power of dealing with an issue, either at the trial or upon an appeal, beyond that which it possesses in the case of an ordinary action.



Nor is there any ground for the contention that special power or authority outside the statute is vested in the Court so as to enable it to conduct the trial of an issue, or an appeal from the order made, otherwise than according to the rules of law, procedure, and practice governing trials of ordinary actions. As has been pointed out, the benevolent and paternal jurisdiction and authority over the persons and estates of lunatics or persons of unsound mind only arises or attaches after a finding and adjudication resulting in a declaration of lunacy or unsoundness of mind. Until that result has been reached, the alleged lunatic is entitled to all the rights and privileges to which any litigant may lay claim. There is no presumption to be made against him, and the proof upon which the trial is to proceed is to be governed by exactly the same rules as in other cases. And he has the right to require and insist that the inquiry and the subsequent proceedings be conducted against him on no different principles. The contention that, because, if the finding be adverse to him, the Court will be concerned in seeing to the care and protection of his person and estate, it is, therefore, to be deemed as in some sense a party to the litigation, and may step outside of the powers to which it is restricted in ordinary cases, appears to me to be contrary to those principles of justice upon which all alike are entitled to rely.

In this case the test must be whether what has been done is justified by the law and rules of practice and procedure applicable to appeals from a judgment entered at or after the trial of an action. If so, then the question would be whether, upon the record as now before this Court, the finding and adjudication and the declaration of unsoundness of mind is sustainable upon the whole case. If, on the other hand, what has been done, or any substantial part of it, was contrary to the law and rules of practice and procedure applicable to such appeals, and, therefore, beyond the powers and jurisdiction of the Court, all such proceedings are *coram non judice* and not binding upon Fraser.

The power of appellate tribunals to direct the reception of further evidence is, it is scarcely necessary to say, purely statutory, and only exercisable to the extent conferred either expressly or by fair implication.

Here the authority of the Divisional Court is derived from Con. Rule 498, which has the force of a statute. By it the appel-

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late tribunal is given "full discretionary power to receive further evidence upon questions of fact," subject, however, to the further provisions of the Rule. By sub-sec. (3), upon appeals from a judgment, order, or decision given upon the merits at the trial or hearing of any cause or matter, such further evidence (save as provided by sub-sec. (2) in case of evidence as to matters which have occurred after the date of the judgment, &c.), shall be admitted on special grounds only, and not without the special leave of the Court.

Obviously it was not the intention to throw the case in appeal open to the reception of further evidence unless upon special grounds shewn for obtaining the special leave of the Court. In general, the order, if made, would be for production of such evidence as, upon such an application, of which the opposite party in the appeal would be notified and have an opportunity of meeting if so advised, a proper case was made for adducing at that stage. It is not, however, to be thought that in a case where it appeared to the tribunal that, by reason of some slip or oversight, a piece of evidence necessary to fully elucidate a point or to complete more or less formally the proof of some instrument or fact bearing on the issues had been omitted, it might not, in its discretion, of its own motion, direct the production of evidence necessary for such purpose.

It would not be proper nor is it advisable to attempt to formulate rules or classify instances, for any such attempt could only tend to hamper or embarrass appellate tribunals in the exercise of their powers under the Rule.

It must be conceded, however, that in doing what was done in this case the Divisional Court has gone much beyond anything that has ever been done by any appellate tribunal in this Province. This fact is not necessarily conclusive against what was done, but it is sufficiently significant to call for careful consideration.

In dealing with the reception of further evidence bearing on matters which had occurred before the judgment, order, or decision upon the merits at the trial, and which might have been produced at the trial, the appellate tribunals have always exercised great caution, for reasons which are explained in some of the cases and are sufficiently apparent. The manifest danger in most cases of throwing open the whole matter after it has been inves-

tigated at a trial, and the opinion of the trial Judge and his reasons for it have become known, has been very generally recognised.

In no case has the direction for reception of further evidence been made to extend to what is in substance a retrial of the whole case, where, as appears from the opinions of the Judges, the evidence adduced at the trial formed the least important factor, the appellate tribunal taking the place of the trial Judge, and, as Middleton, J., says, pronouncing not as upon an appeal but as in the first instance.

For this course I am unable to find any warrant in the law, statutory or otherwise. In my opinion, the course the Divisional Court, if not satisfied upon the argument of the appeal that the case had been so fully developed as to enable a proper decision to be given, should have adopted, was to direct a new trial. That would have sent the case to the proper tribunal designated alike by the Judicature Act and the Lunacy Act for the trial of the issue directed. And it does not appear to me that there exists any power or authority in an appellate tribunal to virtually assume the functions of a trial Judge and enter upon a trial, at which, as Middleton, J., says, the evidence adduced was widely different from that heard by the trial Judge.

Nor do I think there is any warrant for the examination of Fraser by an appellate tribunal. That appears to be something that is to be done by the trial Judge at or before the conclusion of the trial before him. Section 7 (4) is explicit upon the subject, and there is nowhere any expansion of the right or duty enabling the appellate tribunal to substitute itself for the trial Judge in the conduct of such an examination. The judgment of the Judicial Committee in the case of *Kessowji Issur v. Great Indian Peninsula R.W. Co.*, 96 L.T.R. 859, though dealing with a differently expressed statute, bears upon both these questions, and supports, I think, the views here expressed.

If these conclusions be correct, it follows that much of the record now before this Court is not properly before it. The question then is, whether this Court should deal with the case upon the record as it was when the appeal came before the Divisional Court.

After giving the case the best consideration in my power, I think we should not do so, but that we should do what the

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Divisional Court might have done under the circumstances, and direct a new trial.

I greatly regret that this result has the effect of putting aside that which was done by the Divisional Court with an evident desire to fully elicit facts and circumstances that may prove very material and important in arriving at a just conclusion upon the issue directed.

But, in the view I hold with regard to the powers and authority of the Court, I am unable to perceive any alternative.

I would set aside the order of the Divisional Court and direct a new trial, the costs of the former trial and of the proceedings before the Divisional Court and of this appeal to be disposed of by the Judge presiding at the new trial.

GARROW, J.A.:—Appeal by Michael Fraser from an order of a Divisional Court declaring him to be a lunatic and appointing committees of his person and of his estate.

The application was heard before Sutherland, J., in Chambers, who, by an order dated the 23rd day of July, 1910, directed an issue to be tried before Britton, J., or the Judge assigned to preside at the Barrie Assizes.

The issue was accordingly prepared and settled, and was set down for trial at the Barrie Assizes, Britton, J., presiding, who, after hearing evidence, and an examination at his home of the alleged lunatic, dismissed the application. The applicant appealed to a Divisional Court; and, upon the hearing of the appeal, the Court directed further evidence to be adduced, which was done. And the members of the Court also personally examined the alleged lunatic at his home; and, upon the whole material thus obtained, allowed the appeal, and made the order now complained of.

The direction that further evidence should be given came apparently from the Court, and, while acquiesced in by counsel for the applicant, was opposed by counsel for Michael Fraser, who also opposed the further examination of the alleged lunatic by the Court.

Middleton, J., a member of the Divisional Court, in his judgment, said (24 O.L.R. at pp. 262, 264, 265): "Upon the appeal coming before us, we thought that at the hearing the real issue before the Court had not been sufficiently kept in mind, and



that evidence essential to the determination of the sole question before the Court, 'Is Michael Fraser of unsound mind and incapable of managing himself or his affairs?' had not been given.

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"The evidence which we thought should have been given was:—

"1. That of Dr. McGill, the medical man who had attended Fraser for a long time prior to his marriage, and who had also attended the deceased brother John.

"2. That of Mr. Finlayson, who for many years had been Mr. Fraser's solicitor, and who had seen him almost daily from the time of his brother's death till the marriage.

"3. That of Robert Irwin, who was an intimate friend of many years and had been a business confidant of both brothers, and was, along with Michael, executor of John's estate. Against these three men, charges were freely made by counsel representing Mr. Fraser and his wife, with, so far as we could see, no foundation in the evidence.

"4. That of Mrs. Fraser. She would, we thought, be able to explain how Mr. Fraser's affairs had actually been managed after the marriage, and also be able to explain the circumstances surrounding the marriage itself.

"5. The bankers having custody of Fraser's funds, so that we might see how they had been dealt with.

"6. Some of those who were responsible for the marriage, so as to ascertain if Fraser entered into the married state with any apparent appreciation of what he was doing.

"Had the litigation been between the McCormicks and Mr. Fraser, they would have had the right to present the case as they chose, and the Court would have been bound to deal with the matter as best it could upon the evidence adduced. But the inquiry before the Court was not a piece of litigation between adverse parties, but a solemn inquiry by the Court for the purpose of ascertaining if the old man is, at the time of the inquiry, capable of managing his affairs, or is, as suggested, in the feebleness of his old age, the victim of a designing woman and her family, who are attempting to deprive him of his property—her marriage being a mere incident to the larger scheme.

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"Upon such an inquiry the Court is not shut up to the evidence which the parties choose to tender, but has the right to demand the fullest information. The suggestion that it is the duty of the Court, in a case of this kind, to grope blindly in the dark, when light may be had for the asking, belongs to the days of long ago and meets no response in my mind.

"We felt that any inquiry could be better conducted before us than upon a new trial, because much evidence had been taken and much argument had been heard, and this would be thrown away by directing a new trial; but far more important than this was the question of delay."

Upon the argument in this Court, counsel for Michael Fraser renewed the objections which had been taken to the course adopted in the Divisional Court in directing further evidence to be given, and in examining the alleged lunatic, and contended that the order of Britton, J., dismissing the application, should be restored. The first question, therefore, to be determined on this appeal, is as to the procedure in the Divisional Court in respect of the further evidence, and the further examination, under the circumstances which I have stated.

It is practically conceded that what was done was a departure from the ordinary procedure; but it is justified, or attempted to be, upon the ground that, the issue in question arising in a lunacy matter, the Court had some special duty or special power by virtue of which it might ignore the trial which had been had before Britton, J., and try the matter *de novo*.

I have not been able to find any justification for such a contention. On the contrary, it appears to me that the procedure in lunacy matters, however it may have been originally, is now definitely settled by statute; and that, in a word, an issue in lunacy must be tried and afterwards dealt with exactly as if it was the more familiar interpleader issue.

What the Divisional Court has power to do in the one case it may do in the other, neither more nor less.

This seems to be quite clear from a perusal of the statute 9 Edw. VII. ch. 37, which was the statute in force when the application was made.

By sec. 6, the Court—which, by the interpretation clause (c), means the High Court—may, if satisfied that the evidence estab-

lishes the lunacy beyond reasonable doubt, make the necessary order; or, if not so satisfied, may, under sec. 7, direct an issue to be tried, with or without a jury, as the Court or the Judge presiding at the trial directs. Sub-section 4 directs that upon the trial of the issue the alleged lunatic, if within the jurisdiction of the Court, shall be produced, and shall be examined at such time and in such manner, either in open Court or privately . . . as the presiding Judge may direct. . . . By sub-sec. 6 it is declared that the practice and procedure as to preparation, entry for trial and trial of the issue and all the proceedings incidental thereto shall be the same as in the case of any other issue directed by a Court or a Judge. By sub-sec. 7 a right of appeal is given such as may be exercised by a party to an action in the High Court from a judgment rendered at or after a trial, including the right of appeal, without leave, from the Divisional Court to this Court; and the Court hearing any such motion or appeal shall have the same powers as upon a motion against a verdict or an appeal from a judgment entered at or after the trial of an action.

From these very definite provisions it is, I think, abundantly clear that the jurisdiction conferred upon the Divisional Court is appellate only, and in no way includes the powers which the statute expressly confers upon the trial Judge. It does not, and cannot, sit in such a matter merely as a Court of first instance. As an appellate Court it has, by virtue of Con. Rule 498, upon the application of either party, upon a proper case being made for the indulgence, power to receive further evidence, a power very jealously guarded, as the numerous cases on the subject shew, and, if improperly exercised, a proper subject of review on appeal to this Court. See *Trumble v. Horton* (1895), 22 A.R. 51, where an order to admit further evidence was set aside.

The Court has, apparently, no power, of its own motion and without the consent of both parties, to direct further evidence to be given: see *In re Enoch and Zaretsky Bock & Co.'s Arbitration*, [1910] 1 K.B. 327; and see also *Kessowji Issur v. Great Indian Peninsula R.W. Co.*, 96 L.T.R. 859. The parties, and not the Court, are *domini litis* in all civil proceedings. If a party comes into Court with an imperfect case, the proper penalty

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is dismissal. If he desires to give further evidence, he can only be allowed that privilege under the Rule to which I have before referred, which, in my opinion, is as applicable in a lunacy matter as in any other.

It was scarcely attempted upon the argument to uphold what was done as falling within the provisions of what may be called ordinary procedure. The respondent's contention, while scarcely so definitely stated perhaps, amounted to this, that the Court, as representing the King, has in lunacy matters some official power by virtue of which the ordinary procedure may, under certain circumstances, be ignored. For such an idea I can find no warrant.

In Chitty's Prerogatives of the Crown, p. 155, it is said: "The King as *parens patriæ* is in legal contemplation the guardian of his people; and in that amiable capacity is entitled (or rather it is His Majesty's duty in return for the allegiance paid him), to take care of such of his subjects as are legally unable, on account of mental incapacity, whether it proceed from, 1st, non-age; 2, idiocy; or, 3, lunacy; to take proper care of themselves and their property."

Another and equally important branch of the King's prerogative is the creation of Courts. At pp. 75, 76, Chitty further says: "It seems that in very early times our Kings, in person, often heard and determined causes between party and party. But, by the long and uniform usage of many ages, they have delegated their whole judicial powers to the Judges of their several Courts; so that, at present, the King cannot determine any cause or judicial proceeding, but by the mouth of his Judges, whose power is, however, only an emanation of the royal prerogative. The Courts of justice, therefore, though they were originally instituted by royal power, and can only derive their foundation from the Crown, have, respectively, gained a *known and stated jurisdiction, and their decisions must be regulated by the certain and established rules of law.*"

The "known and stated jurisdiction" of the Courts in lunacy matters is, in this Province, expressly conferred and defined by statute. And the statutory provisions to which I have before referred in detail, must govern, else great confusion would arise.

I am, for these reasons, with deference, of the opinion that



the Divisional Court, in calling further evidence and in personally examining the alleged lunatic, acted in excess of its jurisdiction, and that the appellant's objections to the course pursued are well founded.

Upon the merits not much need be said, as, in my opinion, the proper remedy, under all the circumstances, is to direct a new trial of the issue. This may be had if the parties, or either of them, desire, before a jury.

If the matter stood as it did when it left the hands of Britton, J., I would not have been inclined to disturb his conclusion.

But I cannot shut my eyes to the fact that further evidence, of more or less importance, was, although irregularly, produced before the Divisional Court, which it is desirable, in the best interests of the alleged lunatic himself, should be submitted to the proper tribunal.

Nor do I feel as much impressed by a consideration of the necessary delay involved in such a course, as was Middleton, J. Delay is, of course, undesirable when it can be properly avoided; but it is also highly desirable, even at the expense of some delay, that an order practically depriving an old man, whom several respectable witness, and at least one learned Judge, consider sane, of his liberty and the control of his property, and inflicting upon him the stigma of being a lunatic, should only be made after due and even strict compliance with the established course of legal procedure applicable in such cases.

The costs, including those of this appeal, should, I think, be reserved to be disposed of by the Judge upon the new trial.

In any event of this appeal, paragraph 6 of the formal judgment should be so amended as to omit all reflections upon the conduct of Mrs. Fraser, who is in no way a party to this record, although doubtless the real cause of this application: for one may, I think, safely say that, if there had been no marriage, there would have been no application.

MACLAREN and MAGEE, JJ.A., concurred.

MEREDITH, J.A. (dissenting):—This case has been presented, throughout, by the persons whose interests really are being advocated in it, from an entirely wrong standpoint; a thing which,

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no doubt, is natural enough, but none the less entirely wrong; these proceedings, rightly, cannot be seized upon to bolster up the rights, or claims, present or future, of such persons, to the property of the "supposed lunatic;" and must not be permitted to be made use of for any such ulterior purpose, much less to influence the conscience of the Court in dealing with the real question involved.

The real question involved is, whether the supposed lunatic is a person of unsound mind and incapable of managing himself or his affairs; and that question is not to be solved in the interest, or for the benefit, of his wife or of his heirs at law, but solely in his own, and in the public, interests; and the firmer we close our eyes against the purposes and interests of those who are taking advantage of these proceedings to advance their own selfish ends, in the possession or distribution of the supposed lunatic's property, now or after his death, the more likely is right to be done.

The case is not one, or at all like one, nor is it to be treated as one, of ordinary litigation between adverse litigants, able to assert, and to take care of, their own interests. The jurisdiction involved in such a case is entirely different from that which is involved in this case. Under the statute-law of this Province, "all the powers, jurisdiction, and authority of His Majesty over and in relation to the persons and estate of lunatics," is conferred upon the High Court of Justice for Ontario; and the word "lunatic" includes persons "of unsound mind:" 9 Edw. VII. ch. 37, sec. 3, and sec. 2 (e); and the power of His Majesty was based upon his position as *parens patriæ*; so that that jurisdiction which alone should be exercised in this case is of an essentially paternal character. To use the words of Cotton, L. J., as to lunacy inquiries, reported in one of the cases: "They are not taken adversely between litigants, but under special authority from the Crown given to the Lord Chancellor, and other persons designated, under the sign manual, to act for the care and custody of lunatics. It is not intended that these powers, which are only given to enable the Crown to ascertain whether the alleged lunatic is insane, should be exercised by the Lord Chancellor, or Lords Justices, as Judges of a court of appeal deciding between adverse litigants."

Under the statute to which I have referred, the High Court might exercise its jurisdiction without any trial in the ordinary sense; but it has power also, in case of reasonable doubt, to direct an issue to try the question, whether the alleged lunatic is a person of unsound mind and unable to manage his person or affairs, with or without a jury; the difference between the methods of determining the question being—apart from jury or no jury—a trial upon affidavits and a trial upon *vivâ voce* testimony; the jurisdiction being in each case, and under all circumstances, that of the High Court standing in the place of His Majesty, as the Act expressly provides.

In this case an issue was directed to be tried, not because of the right of any one to such a trial, but solely for the better satisfaction of the conscience of the Court upon the question of the alleged lunatic's soundness of mind and capacity for managing himself or his affairs; every act and every proceeding being taken, as I have said, solely in his, and the public, interests: considerations which alone should guide this Court, which, though not the High Court, has, under the enactment, appellate powers conferred upon it: sec. 7 (7).

The issue was, as the Act requires, whether, at the time of the inquiry, the supposed lunatic was of unsound mind and incapable of managing himself or his affairs; and it was tried without a jury, and found in the negative by the trial Judge. Upon an appeal to a Divisional Court of the High Court, much additional, very material, evidence was taken, *vivâ voce*, before that Court, and the finding of the trial Judge was, thereupon, reversed; and an order was thereupon made declaring that the supposed lunatic was, at the time of the trial of the issue, and of the hearing of the appeal, of unsound mind and incapable of managing himself or his affairs; and consequent directions, not appealed against, were given; and the question now is, whether that judgment is wrong; the onus of establishing which is, of course, upon the appellant, who is nominally the alleged lunatic, but really his wife.

The inquiry, in both instances, involved the finding of two facts to support an order such as that now appealed against: (1) that the alleged lunatic was incapable of managing him-

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self or his affairs; and (2) that such incapacity was caused by unsoundness of mind.

Upon the first question I am unable to understand how the Divisional Court could have come to any other conclusion than that which they, unanimously, and without any sort of doubt, reached; indeed, I would be inclined to doubt my own, or any one else's, soundness of mind, if capable, upon the main indisputable facts of the case, of conscientiously saying that this poor old man, fast sinking into his dotage, is capable of managing his affairs—which are in no sense trifling affairs—or himself, either of which would be enough to support the order in question, if, as I have said, his incapacity be caused by unsoundness of mind.

To say that a man who to-day, without any known consideration for it, gives to a woman an order in writing for a discharge of a \$2,500 mortgage, and to-morrow repudiates it; and who to-day gives away the whole of his property, upon which he can lay his hands, amounting to about \$40,000, and to-morrow has forgotten all about it, denying it in vehement language; and who would, undoubtedly, have given away, in like manner, the rest of the property—amounting to another \$40,000 or so—which is coming to him from his brother's estate, if it had come to his hand; and who could be treated as if a mere child, as this man was for some time before and at the marriage, first on one side giving written orders to turn the woman who was seeking to marry him—for his money—and her father off his property; and then, when they, with assistance, had found their way into his house and made prisoners of the persons he had commissioned to keep them off the property, being married to the woman, by her father, before he, the bridegroom, was fully dressed, after being roused from his bed by the conflict; married in such a manner altogether as shocks one's sense of decency, in a supposedly solemn ceremony, performed by a Minister of the Gospel, with the rites of a religious body; and then going over to the other side apparently as contented as a child with a new toy: to say that such a man is of sound mind and capable of managing his affairs, is to say something which seems to me to be wholly incredible. One has but to imagine what would have happened if any attempt had been made to treat this, when in possession



of all his faculties, stalwart Irish-Canadian, as he was treated at this marriage and for some time before—to treat him as if he were almost an imbecile, and so to treat him in his own house, his own castle—one has but to imagine that to see and know what a mental falling off was there, to what a helpless condition he has degenerated. It is not necessary to refer to the many other evidences of his mental deterioration appearing throughout the testimony. In regard to his inability to take proper care of himself, his condition up to the time of the marriage, and the manner in which he had to be cared for, shews that; and the greatest excuse for his wife's conduct, if there can be any, in getting possession of him, was his need of some one to take care of him; I can have no doubt of his need for a nurse, but not at the cost of his fortune, when better qualified medical persons are available at reasonable wages: his need was of one who would take care of him, and of his property for him, not take care of him in order to wheedle him out of it.

Then is his present condition, as to inability to manage himself or his affairs, the result of unsoundness of mind? What else can it be? Nothing else has been suggested, nor could anything else reasonably be suggested. The man is upwards of eighty years of age; and, if the saying that “a man is as old as his arteries” be true, his age is considerably greater; his arteries are so degenerated that his own physician—at the present time—declared upon oath that it would be very dangerous to his life for him to give evidence at the trial of the issue; and, consequently, he was relieved from his duty to attend and be examined there: the same physician also testified to his having had a slight hæmorrhage of the brain—stroke of paralysis—in June, 1910, when he was attending him as the “family physician:” the family history, regarding mental disease, even when read in the most favourable light, is very bad; and his conduct towards one of the witnesses, as well as his conversation with another of the witnesses in regard to marrying a daughter of that witness, and the other things of the same character detailed in the evidence, as well as his marriage, to which I have referred, all seem to be in accord with mental derangement and of degeneration of a character not uncommon in old age. Among the typical symptoms of senile dementia

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Dr. Berkeley mentions that "plans of marriage are formulated and declaimed upon;" quite in accord with this case.

In these, and in the other circumstances of the case, what could be looked for but mental derangement as the cause of the man's mental condition? But mental disease is not necessary to support the order appealed against; the supposition that it is, seems to me to account for some of the medical testimony which otherwise it might be difficult to account for: the mind ought not to work after this fashion:—If I cannot clearly find some lesion of the brain or some known mental disease or abnormal condition, I am justified in testifying against unsoundness of mind; but rather after this fashion:—finding undoubted incapacity, how can it be accounted for except by unsoundness of mind? For I cannot doubt that there may be that which is in law unsoundness of mind arising from mere natural decay. The use of the word "lunatic" is, by reason of its more generally accepted meaning, apt to be misleading: see *In re Lord Townshend's Settlement*, [1908] 1 Ch. 201. This ought to be known to the medical profession, for I find it very plainly expressed in such standard works as Dr. Maudsley's: one may be capable of making a will, and yet, by reason of loss of memory through old age, quite incapable of managing his own affairs or person.

So that I cannot think that any one, having in mind the evidence adduced before the Divisional Court, can conscientiously and reasonably assert that the supposed lunatic is capable of managing himself or his affairs. No one has yet, as witness or Judge, said so; and, if any one had, the facts would shew the inaccuracy of it. It was argued that it was not necessary that the man should be physically capable of managing his affairs or even himself, that it was enough if he could employ others to do that for him; a contention that no one will dispute, if it means that it is enough if he can manage his servants and agents, those who manage for him; but the contrary of that ability is proved in the way he has permitted his wife to despoil him of his whole available property, and in his belief that it is all yet his own, in his own name and under his sole control, and that, if not, he has been robbed of it; and in his want of understanding as to his means and where deposited or by whom held. In order that there may be no misunderstanding as to his pitiable state of mind

in regard to these things, I take up the time necessary to read some extracts from his statement to the Judges:—

“Q. Who owns the farm now? A. I own it.

“Q. In your own right? A. In my own right.

“Q. You have not parted with it to anybody? A. No, I never would part with it.

“Q. You have not given it away to anybody? A. No.

“Q. I was told you had given that property away? A. Well, whoever told you, told you an untruth.

“Q. I was told you made a deed of it to your wife? A. Well, I may have given it to the wife for all I know, but I have no recollection of it.

“Q. Somebody said you gave her this house. Is that true? Have you any recollection of that? A. I might just have hinted it to her, but she hasn't got it yet, I don't think. I don't think she would have it that way, anyway.

“Q. You have no recollection of having deeded to your wife the house we are now speaking in? A. No, I may have hinted to her, you know, that when I drop out of the world that all that I own would be hers. There is the only way. Whoever has told you that has exaggerated.

“Q. But you have never actually signed any deed? A. No.

“Q. To her? A. No, not yet. I have signed nothing to her yet.

“Q. Nor any deed of the farm? A. But I gave her an understanding to this effect, that I would leave all I have, or the greater part of it, to her anyway after I drop off.

“Q. But, as far as actually deeding it is concerned, you have not yet done so? A. Not done it to anybody at all.

“Q. Neither the house nor the farm? A. Nothing whatever.

“Q. Indeed! Coming back to your own money that was in the bank at the time you got married, whether it was your own or money belonging to John, where is the money now? A. I never would mention another party's money, for fear they would think that I would lay claim to it. John's and mine were separate while he was living, and I believe I had ten or twelve thousand dollars of my own in the bank.

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"Q. In different banks? A. Yes.

"Q. In Midland? A. Yes, some in each of the three banks.

"Q. And is that still there? A. I think so. Why shouldn't it be?

"Q. You have not parted with it? A. No.

"Q. Who owns it now? A. Of course, it is mine now.

"Q. You have not given that away to anybody? A. No, not at all.

"Q. It was said that you had given it to your wife, is that true? A. No (laughs). Who could say that at all? She hasn't got a dollar from me yet, the poor creature, but I told her, I had made hints to her you know, that in case I drop off it would be all hers. That is all. Probably that is how that has come out.

"Middleton, J.: It is curious how these stories get around, is it not? A. Yes. I never have given the poor little woman—I offered her twenty dollars on a couple of occasions, and she declined taking it.

"Mulock, C.J.: Was it you sold the property to Midland and got debentures for it? A. I think it must have been my brother Samuel.

"Q. Well, you did have some debentures of the Town of Midland, did you not? A. I have no knowledge of it.

"Q. The Town of Midland bought some property, and we are told that the Town of Midland, or is it a city, issued debentures, or bonds; do you know what bonds are? A. I never signed a paper for any municipality in the world or party either.

"Q. Do you remember owning at any time, either in your own right or through any of your brothers, any bonds or debentures of the Town of Midland that you are living in? A. I believe my brother Samuel did.

"Q. But you did not? A. No, never. I never dealt with the corporation in my life, never.

"Q. We have been told that when you got married, Mr. Finlayson, a lawyer here, was acting for you as your lawyer, was that right? A. I don't know; I heard them saying he has some claim on me.

"Q. No, it is not any claim, but that there was a debenture falling due at that time, a debenture issued by the Town of Midland; it was one of a number, and that you at one time had



owned a considerable number of those debentures going up in value to about \$13,500?

"Teetzel, J.: Ten debentures at \$1,300 each? A. It is likely it was my brother John, but I never had any dealings with a corporation in my life, only to pay my taxes. Likely it was my brother John.

"Mulock, C.J.: Is it your recollection then that you never had any debentures of the Town of Midland? A. It is. I never had any claim against the corporation.

"Q. A claim either of your own or debentures that might have come to you through any of your brothers? A. They might have come to me through my brother John.

"Q. Did you ever hear of any coming to you through your brother John? A. No.

"Q. Do you remember ever giving any order to have these given to your wife? A. Eh?

"Q. Did you ever authorise any one to give these debentures over to your wife? A. No, never.

"Q. Or to Mr. Grant? A. No.

"Q. Do you know Mr. Grant, a lawyer here? A. I have seen him, that's all I know about him.

"Q. Is he acting for you? A. I really cannot say.

"Q. Who is your lawyer? A. I have none whatever.

"Q. You have heard of this trouble that is on in the Courts, have you not? A. There is a—I have heard something of it.

"Q. What do you understand is going on just now? A. What is going on? If there is anything going on, they are doing their endeavour to pluck me. That is the whole short and long of it. I don't know a pin's worth about them, or care a damn about them. I paid my way and always did from childhood up.

"Q. Have you any lawyers acting for you now in any cases? A. I believe that firm named Grant & King are acting for us.

"Q. For us? A. For myself and my wife.

"Q. In what matters? A. Oh, for some—lest some party should try to pluck us, I suppose, to prevent that. My gracious, I never knew the like, a fellow that never meddled with a soul in the whole world.

"Q. That is the way of the world? A. Well, it is, sir, yes.

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"Q. When a man gets as much experience as you have got, you don't expect much from the world? A. No, I don't.

. . .  
"Q. Do you recollect once, when the Rev. Mr. Robertson came here with your present wife, and you wanted them to leave the premises and keep away from the premises? A. No, never. I never gave orders to anybody to leave the place or keep away from it. My brother John might for all I know, but he, poor fellow, I believe, has gone over the mountain.

. . .  
"Mulock, C.J.: Here is a signature of yours to a piece of paper, and I want to see if this is your signature. I will read it to you, shall I? A. Do, please.

"Q. It is dated, 'Midland, September 28th, 1909.' That will be two years from next September? A. Two years, yes.

"Q. A year ago last September. This is directed to Mr. Robert Irwin. That is the co-executor, is it? A. Yes.

"Q. It is worded as follows: 'You will please take such steps by the employment of constables, or otherwise, as may be necessary to protect my house and grounds from trespass by one Robertson, or others.' Whose signature is that to that? A. It isn't mine, anyway.

"Q. It is not yours? A. No. I never signed my name if I can't do it better than that.

"Q. That is not your signature? A. No.

"Q. Did you ever give orders to Mr. Irwin to employ constables or other people to protect your house and property against trespass by Robertson? A. Who is Robertson?

"Q. What was your wife's name? A. Robertson. No, never in my life. I never gave an order to any person in all my life. My brother John may have done it for all I know, and he is out of the world now, but I never did.

"Q. But this paper is signed 'Michael Fraser'? A. Is it? Well, it isn't mine.

"Q. You never gave an order to anybody to keep them off the premises? A. No, never in the wide world. Because if they were trespassing or intruding on me I would keep them off myself pretty damn quick.

"Q. A little of the old Irish would come up in you. Do you

know Mrs. Weston? A. Mrs. Weston? Yes, I do pretty well. My little wife knows her far better.

"Q. Where does she live? A. Right across there, that brick house across there.

"Q. Did your brother have any mortgage against her, John? A. I believe he had. Really, I am not certain. You see, gentlemen, you know, we have been seven brothers of us and we never tried to inquire into each other's affairs whatever, lest the idea should get out that we were trying to pilfer or——

"Q. After John died did you ever have any business talk with Mrs. Weston about the mortgage that was held against the Weston property? A. My gracious, I never opened my lips to the woman in my life. She visits once in a while up here, my wife you know, and they have a little chat, but I don't interfere in their conversations.

"Q. Do you know what the amount of the mortgage was? A. I do not. I never inquired of poor John, never inquired into his affairs whatever.

"Q. You never knew what it was? A. No. I don't know the amount anyway.

"Q. Were you not one of his executors? A. I believe I am. But it is lately, isn't it? That Irwin up there is one, I believe, and I another.

"Q. Did you never make inquiry after John's death how much was owing on that Weston mortgage? A. No, I did not. I never inquired a whimper about anything belonging to him, about any of his affairs.

"Q. Some witnesses in the Court told us that there was about \$2,500 owing on that Weston mortgage? A. That they owed that to John Fraser, is it?

"Q. Yes? A. I know nothing about that, gentlemen.

"Q. Do you know that you are entitled to your brother John's property? A. Of course, I am what is called the heir at law, I know.

"Q. Under your brother's will? A. And my brother who lived over there, Samuel.

"Q. Is Samuel living yet? A. I really cannot tell you.

"Q. Where was Samuel living when you last saw him? A. Oh, living on that lot over there.

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"Q. Near your homestead lot? A. No, more up that way.

"Q. How far from here? A. It would be about a mile from here.

"Q. In the township of Tay? A. Yes. It would not be a mile. A little better than half a mile.

"Q. You are not sure about his living there yet? A. I am not certain whether he is living or dead now.

"Q. When did you last see Samuel? A. The last time I saw him I guess would be six or eight months.

"Middleton, J.: Samuel was the one that was the Reeve? A. Yes, that is the one that used to be Reeve of the Township, and he was a J.P. too.

"Mulock, C.J.: They are all dead but you now? A. I believe so. That is what I have been told, you know. You know, gentlemen, I have been sick myself, and I am not able to move around, and the most of my intelligence has come through acquaintance with other parties, inquiring of them.

"Q. Coming back then to Mrs. Weston's mortgage, do you remember telling Mrs. Weston that you were going to forgive her that mortgage? A. No. Forgive? No.

"Q. You never did? A. Never in the wide world. Never in the wide world. I never darkened the woman's door, never darkened her door, and how could she expect favours of me that never received the toss of a straw from one of them?

"Q. It is said she came here to your house one day just after John's death? A. She is here a couple of times a week.

"Q. And that she got from you a paper to Mr. Finlayson to make out a release of her mortgage and that you gave it to her? A. I heard something of it. I heard it whispered, but I never did.

"Q. You never did? A. Never.

"Q. Is it your intention to collect what is owing on that mortgage? A. I don't know yet.

"Q. You don't know what you will do? A. No, I hardly know.

"Q. Let me tell you what this piece of paper says. Can you read that signature there? A. I see Mrs. Weston's name in it and Michael Fraser's name in it. That is all I can read of it.

"Q. Who wrote 'Michael Fraser' there? Can you read it at all? A. I could not without my glasses.



"Q. Well, I will read it to you. 'William Finlayson, Esq.' Who is he? A. A lawyer. I have heard of him, but I have no acquaintance with him. I never saw him to my knowledge.

"Q. You never saw him? A. I think not.

"Q. I mean Mr. Finlayson, a lawyer in Midland? A. Yes, Finlayson, I have heard of the name, that there is such a person, a lawyer, but I never had the pleasure of his acquaintance or seeing him.

"Q. You never saw him at the house here? A. No, never.

"Q. He told us in Toronto that he was in the habit of coming to your house. A. (Laughs) I never saw the gentleman at all. I know his name well enough. I have heard the name mentioned often enough.

"Middleton, J.: Did you give him any cheques? A. Sir?

"Q. Did you give him any money? A. Not to my knowledge, I never gave him a dollar.

"Mulock, C.J.: I want to read this paper to you and see what you say about it? A. If you please.

"Q. 'William Finlayson, Esq. September 8th, 1909. I wish you to make out a release of the Weston mortgage.' Signed, 'Michael Fraser.' A. I never signed a paper for her. A damn old — old stink.

"Q. You never signed that? A. No.

"Q. We were told that that was in your handwriting? A. It is not my writing.

"Q. That the body of that is in your writing? A. No, no, it is not my writing.

"Q. None of it is your writing? A. No.

(The document referred to is exhibit 12.)

"Q. At all events did you ever intend to give up your mortgage against Mrs. Weston? A. No, never. I had nothing to do with it. The mortgage belonged to my brother John. It was he that took the mortgage. The woman comes to our place once or twice a week.

"Q. See if you cannot remember having met Mr. Finlayson some time. I want to try and refresh your memory, if I can. I have now in my hand a cheque on the Bank of British North America, and there is a signature at the bottom of it, 'Michael Fraser.' Tell me, is that your signature? A. Ah, it is not.

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I never signed anything for anybody. Damn impostors, they ought to be sent to hell, the buggers, for all I know about the damn crew.

"Q. Let me tell you what this cheque says. You had better know what they have got your signature to? A. I suppose it is trying to cheat me out of some money.

"Q. I don't know what it is for, you can explain it perhaps. A. I cannot. I know nothing about it. I have no dealings with any of the people around here at all. Didn't want to know them.

"Q. This cheque is dated September 28th, 1909. A. I have no knowledge of it.

"Q. That is a short time after your brother John died. He died in August, 1909, didn't he? This is the way it reads: 'Pay to W. Finlayson, or order, \$1,000, a gift to Miss Catherine McCormick.' From Michael Fraser? A. He is an impostor. God damn the damn son of a bitch—that there should be such damn scoundrels in the world.

"Middleton, J.: What we are here for is to see whether any of these people are putting up any frauds upon you? A. I hardly know that mother McCormick at all.

"Mulock, C.J.: Miss McCormick? A. Miss, I know, but I call her mother. She is old enough to be a mother.

"Q. At all events here is a cheque which is a gift from you to her of \$1,000. Did you ever give her \$1,000? A. No, not a red cent did I give her.

"Q. Well, there is a cheque for \$1,000 of your money gone to her. A. Well, who will give it to her? Will the bank give it to her? The bank will have to be at the loss of it. For I won't.

"Middleton, J.: The bank gave it to her. A. Did they?

"Mulock, C.J.: Yes, the cheque was cashed and the money drawn. A. Well, my gracious, did any one ever see such a damn infernal country as this?

"Q. Then here is another cheque of the same date and signed, 'Michael Fraser'? A. Michael Fraser never signed anything for anybody.

"Q. Wait until you hear this one. A. He signed a cheque for himself, his own cheques; that is all the cheques he ever signed.

"Q. This is another cheque on the Bank of British North

America, and it is, 'Pay to W. Finlayson \$3,000, a gift to R. McCormick.' Did you ever give R. McCormick \$3,000? A. That is a fellow named Richard? No, never, I would kick the fellow's backside first; damn it, I am sorry I didn't do it when I had him here. Since I came up into this house, I was out in the field there, and he was tossing things around like the mischief and swearing like a trooper. I came up and I laid hold of him, and, 'Come sir,' says I, 'Out of this!' I am sorry I didn't kick the guts out of the bugger.

"Q. Sit down. Do you know that this \$3,000 is gone? A. It is gone? And who has paid it? I didn't pay it. I gave no order to pay it.

"Q. The bank has paid it. A. Well, let the bank lose it. I am not going to lose it.

"Middleton, J.: It is about time some one should get after the bank, is it not, to make them put the money back?

"Mulock, C.J.: The money must be put back? A. That is so. I never gave an order to anybody for money in all my days.

"Q. Do you know Dr. McGill? A. No, I don't know him. No, I believe my brother had him a couple of times, attending him. I don't know him.

"Q. Did he ever attend you as a doctor? A. Not to my knowledge. Once I believe I went to his office. That is all I know about him.

"Q. He says you signed a cheque to him for \$1,000? A. He is an infernal liar, and I will tell him to his teeth, the bugger; an infernal god damn liar. Damn it, is this Canada getting—

"Q. Well, he has not got his money? A. Is this Canada getting to be such a devil of a country as this?

"Q. He has not got the money yet? A. Well, I never signed anything for him. I am sorry, gentlemen, to create such a disturbance in your ears.

"Middleton, J.: If they are robbing you, you ought to create some disturbance.

"Mulock, C.J.: If people are plundering you, you have a right to be indignant. A. Of course I have, sir, that is so. I never signed anything for anybody. I pay my lawful debts as soon as they are asked of me.

"Q. Here is another cheque to H. R. McGill for \$125 on the

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Bank of Hamilton. Did you ever give him that cheque? A. No, never. No, never.

"Q. Here is a cheque to Margaret Fraser for \$2,998.41? A. Margaret Fraser? Who is she?

"Q. That is for you to say? A. Margaret Fraser? I believe I am married—but I don't know whether that is her name or not.

"Q. Supposing you are married, and supposing that is the name of your wife, do you remember ever giving her a cheque for \$2,998.41, or thereabouts? A. No, never gave a cheque to a female, whether the wife's sister or mother, in all my days. No, never.

"Q. Look at that cheque and tell me if you know whose signature that is? A. I want my glasses, please. I nearly drew the last amount in the Bank of Hamilton when I lived outside, before I came in here.

"Q. What do you mean by before you came in here? A. To live in this place. Of course, we lived outside. (His spectacles having been handed to Mr. Fraser.) You want to know whether that is my signature or not?

"Q. Yes? A. No, that is not mine. That is a fraud.

"Q. You say before you came from the country to live in Midland you drew out all your money, out of the Bank of Hamilton, did you? A. The greater part of it. I believe I only left about \$800 in it.

"Q. And what became of that? A. I suppose it is remaining in it yet, if the bank is anyways solvent.

"Q. Oh, the bank is all right, it is a good bank? A. I believe so, yes, and I left it there.

"Q. This cheque for \$2,998.41 that the banks say you signed, you say you did not sign? A. No, I never signed it, no, never.

"Q. Do you remember ever agreeing to give Margaret Fraser that amount? A. Eh?

"Q. Do you remember telling Margaret Fraser that she could have that money? A. No.

"Q. Or that she could draw it out? A. Who is that, Margaret Fraser?

"Q. You say you have married a woman named Margaret? A. I am married to—I really believe that is her name, Margaret; but I never made a promise for anybody.



"Q. Then you did not give her that? A. No, I told my wife that if I dropped out of the world that she would be the principal possessor of all I owned, yes.

"Q. Well, do you know whose signature that is? There is another cheque on another bank, the Bank of British North America. I will read it to you if you like? A. This is more like my writing than any other part of it, but it is not mine.

"Q. It is not yours? A. No.

"Q. What I am shewing to you now, Mr. Fraser, is another cheque dated the 14th February, 1910, for another sum of money, namely, \$2,536.45? A. Who is that to?

"Q. Well, that cheque purports to be signed by you and payable to yourself, and your name is on the back of it, and it is said that you signed that cheque and put your name on the back of it, and gave it to your wife to draw the money for herself. Is that true? A. I don't think it. I have no knowledge of it.

"Q. No knowledge of it? A. No. No knowledge of it whatever.

"Q. Where ought your money to be that was in the Bank of British North America when you got married, where ought it to be now? A. I suppose they have some of it in each of the banks.

"Q. In whose name? A. In my own name.

"Q. You have not given away that money? A. No.

"Q. Any of this money? A. No, none whatever.

"Q. I have some other little things I want to ask you about? A. I never thought there was such damn cheats in this Ontario.

"Q. Do you know what property you own behind John's property, these two lots in Midland? A. Yes, I think I do. I can't give it just on the moment.

"Q. Have you ever sold any of the land that you owned in Midland since John died? A. No, not a perch since John died. I have not sold a perch of land since John Fraser died.

"Q. Did you sell Dr. McGill any land before John died? A. No, I don't know anything about McGill at all. Never saw him that I know of.

"Q. Dr. McGill says he got a deed from you of a piece of land at a price of \$500, and that he did not pay the money, but the \$500 went on account of moneys owing to him by John and by

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you? A. Oh, gracious, he is a damned impostor, and I will tell him to his teeth and probably kick him, too, or he kick me, one or the other. By heavens, I won't be bullied in this style.

"Q. Supposing he produces a deed signed by you for that piece of land for \$500 consideration, what do you say to that deed? A. I say it is a cheat, it is a forgery.

"Q. Supposing Finlayson says he came here to your house and drew that deed by your instructions, what do you say to that? A. I will tell him he is lying. I will tell him he is a liar, damn him, to his teeth, and he may knock me down if he is able, the bugger. Do the damn whelps think men are mice that they can impose on them this way?

"Q. Did you ever have any business dealings with Dr. McGill? A. I don't know the gentleman. I believe my brother John went to him to consult him a couple of times.

"Q. Who is your doctor now? A. Raikes is our principal doctor; I wouldn't give him for all the doctors and lawyers in Midland.

"Q. There were some papers of yours in Mr. Finlayson's office once, were there not? A. I don't know that I ever placed any papers there. I never had anything to do with Finlayson. My brother Samuel might and John might for all I know. And the name Fraser might be to them.

"Q. Here is a paper signed Michael Fraser. I will read it to you, shall I? A. Do, please. Let me look at it first.

"Q. Do you think that is your signature? A. No, the writing is not mine. It does not belong to me at all. I have a horror of scribbling on paper or sending documents to anybody.

"Q. Shall I read it to you? A. Do, please.

"Q. 'Midland, April 21st, 1910. Mr. Finlayson. Dear Sir: Kindly give my wife any of my papers that she may ask you for, and oblige, yours very truly, Michael Fraser.' What do you say to that? A. What is it dated?

"Q. It is dated a year ago last April. This is May. A. Well, I had no wife a year ago last April.

"Q. When did you get married, how long are you married? A. It is now, I am married on the 13th January, 1910.

"Q. Well, this is dated April, 1910. A. Well, it is a forgery.

"Q. That is three months after you were married. If you

were married in January, you were married in April, that is, you had a wife in April. Well, no matter. Did you ever give your wife instructions to go to Mr. Finlayson to get any of your papers? A. Never.

"Q. Very well, that will do. A. Never in the world. The woman is truthful. She will deny it. She will acknowledge everything that I did for her. I never gave her an order for anything. And if she is acting that way—treacherously that way—she is a damn scoundrel. Damn it, did you ever know such a thing, the spawn of a damn Irish navvy? I could kick the guts into them or out of them, when I have them in my power.

"Q. Did you have a mortgage against a man named Smith? A. What is his Christian name?

"Q. It is that Smith that used to be around your house here? A. No, I have no mortgage. My brother John might, for all I know.

"Q. Did you have a mortgage against a man named Johnston? A. No.

"Teetzel, J.: Smith's name is William Smith. A. What countryman is he?

"Q. The man who was about your place here a year or so ago? A. My brother John might, but I never had a mortgage against a soul in my life.

. . .

"Mulock, C.J.: I want to find out what become of the inventory to John's estate. Mr. Finlayson made out a list of the things belonging to the estate of John, and he says he gave it to your wife. If he did, do you know what became of it? A. Probably he did. I don't know a pin's worth about it. That is the first I heard of it. I will inquire of the little wife and know whether she did or not. Know whether she is truthful or not, and if she is not truthful I will think the less of her. I never heard that he gave it to any person in the world.

"Q. Are you aware that she got a good deal of money out of your bank accounts? A. No, I am not.

"Q. And got it into her own name? A. I don't know a pin's worth about it. I fancy I gave her an order for some money one time.

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"Q. You did? A. Yes.

"Q. What was that order? A. I really don't know. My memory latterly—I am badly getting indifferent about things. I hardly care how they go.

"Q. What was she to do with any money she got from you, was it for the house, the expenses? A. Partly for the house, and partly to give herself an odd new dress. Because I know the sex is fond of dress.

"Q. About how much was that order for? A. I really don't know.

"Q. About how much money? A. I don't know. I cannot tell you, sir.

"Q. Was it for as much as \$100? A. I don't think it.

"Q. Was it for thousands? A. Oh, no. I would look a good while before I would give her thousands. I might give her a hundred and would not grudge it to her.

"Q. Do you say you never gave her an order for as much as a thousand? A. No, not for a hundred either.

"Q. At no time? A. No, I asked the little wife here a few days ago if she would accept a little money, and she would not. Declined it. Said she had enough in her pockets.

"Q. Do you know whether or not you have made a deed of this house to your wife? Who owns this house? A. It belongs to me.

"Q. Not to your wife? A. No.

"Q. You have never made a deed of it to her? A. I have not, but I told her I would give it to her and all the land around it, too.

"Q. When were you to give it to her? A. As soon as I kicked the bucket.

"Q. You mean you would give it to her by will? A. Yes, by will.

"Q. But do you say you have never given it to her by a deed? A. No, never.

"Q. It is your property yet? A. Yes, I never gave it to anybody yet. It is my own. I have my clutches on it yet.

"Q. Did you ever make any will? A. Never.

"Q. You have never made a will yet? A. Never, I have



a horror of them things. It is next to going to die, to kick the bucket.

"Q. We have been told that when John was alive you made two wills, before John died. Did you? A. No, never.

"Q. And that after John died and before you got married you made another will? A. No, never. Never made a will in my life. They are fabricators and mischief-makers that say so.

"Q. We are told that since you are married you have made still another will? A. I have not made a will in all my life yet.

"Q. You have not made a will at any time? A. No, never intend to. My gracious, what trouble they are taking about people.

"Teetzel, J.: Which church do you belong to, Mr. Fraser?  
A. The Church of England.

"Q. Who is your minister? A. Up here?

"Q. Yes? A. Mr. Hanna.

"Q. He visits you, I suppose, does he? A. Once in a while.

"Q. A pretty fine man, is he not? A. I believe he is, yes.

"Q. A splendid man? A. Yes. Our minister in the old country was the Rev. Henry Stewart. He was over six feet high, and he had three children, three little girls.

"Q. What minister married you? A. It was the Rev. Mr. Robertson.

"Q. Any other minister with him? A. No, he did it himself.

"Middleton, J.: Who were in the house when you were married? A. I really forget who they were now. Some friends of ours—some of my brother's.

"Teetzel, J.: Which one of your brothers was present at your marriage? A. John was there.

"Q. Who was your best man? A. I really don't know.

"Q. Was Samuel there? A. No, I believe Samuel was not living at this time. I am not positive, you know.

"Q. Any of your sisters at the wedding? A. Sisters? Never had a sister in my life. Her brains were knocked out in her eighth year on the door-step.

. . .

"Q. You said you were engaged only a short time before

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you were married—how long were you engaged before you were married? A. Probably ten or twelve days.

“Q. You have no family, I suppose? A. No. We are only about 12 or 14 months married.

“Q. You have hopes, then, yet? A. That is so, yes. My hopes are bright. Would you take a taste of whisky, gentlemen?

“Mulock, C.J.: Thank you, no, I won't. I don't know about these other gentlemen. A. We have some in the house, I believe, if I could only find it.

. . .

Mulock, C.J.: I spoke to you a little while ago, Mr. Fraser, about a cheque on the Bank of Hamilton for \$2,998.41? A. Yes.

“Q. This is a cheque I am now shewing you. A. And who is the author of that?

“Q. Well, it pretends to be signed by you? A. I haven't had that amount in the Bank of Hamilton.

“Q. Then, later on, the Bank of Hamilton statement shews another cheque drawn against your account for \$3,013.70? A. And who is the author of that?

“Q. The cheque is not here, but the bank claims that you drew a cheque for that amount and gave it to somebody—is that true? A. No, it is a lie. It is hell's own lie, concocted by Beelzebub.

“Q. It is contended that that cheque was given to Margaret Fraser? A. Margaret Fraser, and who is she?

“Q. Your wife, I expect? A. Well, what is the date of it?

“Q. February 14th, 1910. A year ago last February. Did you ever give to your wife that cheque? A. No, never. I never gave her a cheque in my life. Never. 1900 and how much?

“Q. 1910.”

All of which is a hopeless muddle of inaccuracies upon vital questions affecting the man's capability in the management of his own affairs, shewing without any room for doubt, I would have thought, his utter incapability.

So, also, I cannot but find that such incapability was caused by unsoundness of mind.

But it is said, in effect, that, if that be so, the Divisional Court had no right to find it out; a contention which, in my opinion, has nothing in law, or in reason, to support it.

If the case were one of ordinary litigation, between adverse litigants, confined to their strictest rights, I would have no doubt that the Divisional Court acted well within its power, and indeed was in duty bound to obtain the additional light thrown upon the case by the additional evidence, adduced before it, when the case appeared to be so incomplete as it was, without it. The taking of additional evidence, even in such cases, is expressly authorised by legislation, and is not even an uncommon practice in this Court. It is the duty of the Judges to find the real truth of the matters in controversy. The power expressly conferred upon appellate Courts is "full discretionary power to receive further evidence on questions of fact;" a power which, of course, must be exercised so as not to be made the means of doing an injustice to any party to the litigation, but only a means of elucidating the truth; but also a discretionary power which ought not to be interfered with by an appellate Court. But this case is one of an entirely different character—under the Lunacy Act—in which it is the duty of the Court, acting in the place of His Majesty, to find out the state of the supposed lunatic's mind; and I can have no manner of doubt that the Divisional Court rightly exercised a power which it had, and wisely performed a duty, in receiving the additional evidence: and I can find no excuse for any other court deliberately closing its eyes to the truth revealed in the Divisional Court: nor any excuse for treating this as ordinary litigation between adverse parties, which it obviously is not; nor for failing to appreciate the fact that the additional conclusive evidence comes from the man's own mouth, and must be admitted as evidence whenever and wherever the question of his mental capabilities has to be determined.

Then it is said that, if that be so as to the evidence, the Divisional Court had no power to hold the examination of the supposed lunatic. But, again, why not? The High Court of Justice acts, as I have said, in the place of the King as *parens patriæ*; legislation requires that the supposed lunatic shall be produced and examined at the trial of the issue unless the Court otherwise directs; the supposed lunatic was seen and examined by the trial Judge; seeing and hearing him has always, in legislation as well as in practice, been deemed a thing of great importance; in some cases an appeal might be a useless proceeding unless the appellate Court

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could have also the advantage of seeing and hearing the supposed lunatic; if it had not exercised that power, in this case, the most weighty of the whole evidence would be wanting, the truth would not have been elucidated as it has been; it cannot be doubted, I think, that, even if the case were one between adverse litigants, standing upon their strictest rights, the Divisional Court would have had power to have compelled him to attend, and to have examined him upon oath, before it; but they chose, in his ease and for his benefit, just as the trial Judge did, to see and to converse with him in his own house; and, above all, there was the power of His Majesty over the persons and estates of persons of unsound mind, now existing in the High Court, under which that Court might, even if the finding upon the issue stood, exercise its jurisdiction, at a later date, upon further evidence, without requiring that the proceedings be taken anew. The fact that the power of the Court may be exercised by a Judge in Chambers does not derogate from the power of the Court; nor can I think that the "revised" Lunacy Act was intended to, or does, substantially change the power or duty of the Court under the earlier enactments intended to be embodied in it, but rather to simplify the procedure in exercising such power and duty. Interesting instances of examinations of a like character will be found in such cases as *In re Cumming* (1852), 1 DeG. M. & G. 537; *In re Bridge* (1841), 1 Cr. & Ph. 338, 347; and *In re Gilchrist*, [1907] 1 Ch. 1. The Indian case so much relied upon by Mr. Watson is not at all applicable; it was a case between adverse litigants, in which the Court undertook to determine the question of fact really upon their own evidence, instead of upon that adduced at the trial.

Many cases have been referred to; but, as the question is one of fact only, and no two cases can be quite alike, in their facts, they cannot have authoritative effect; and indeed some of them may be misleading if applied to this case, such, for instance, as those between adverse litigants determining questions as to the validity of wills and of contracts; for no such question arises in this matter, nor will anything done in it conclude any such question; that which is in question is, whether the supposed lunatic is, by reason of unsoundness of mind, so incapable of managing himself or his affairs that they or he ought to be managed by a committee appointed by the High Court, under the power conferred upon it



by the statute; and, as I have already intimated, I cannot understand how any reasonable and conscientious person could now say, in view of the revelations made in the proceedings in the Divisional Court, that he is not so incapable.

It may be said, and truly said, that many a person more unsound in mind, and less able to manage his or her affairs than the supposed lunatic, is permitted to depart this life without having been declared of unsound mind; and rightly so, because there was no need of any such precaution, because such lunatics were surrounded by those who were willing and able to protect them and their property, not left alone in the world subject to the wiles of those who were willing to stoop very low to conquer the man's money, and so eager for it that all that could be made available was speedily extracted from him and in such a manner that he is now unaware of having parted with any of it, and is incensed at the thought of it.

Another question of some importance also arises in this case, and one upon which it is proper to express my opinion, though, as I have already intimated, the order in question should be sustained without any aid from it. That question is as to the effect upon this case of the recent enactment (1 Geo. V. ch. 20) which more broadly defines the meaning of unsoundness of mind under the Lunacy Act; it was passed on the 24th March, 1911, and provides, among other things (sec. 1), that "the powers and provisions of the Lunacy Act, relating to management and administration shall apply to every person not declared to be a lunatic with regard to whom it is proved, to the satisfaction of the Court, that he is, through mental infirmity, arising from disease, age, or other cause, or by reason of habitual drunkenness or the use of drugs, incapable of managing his affairs." The additional evidence was taken, the supposed lunatic examined, and the order in appeal made, by the Divisional Court, after the passing of this enactment. The appellant's contention is, that the provisions should not be applied to the case. If the strict rights of adverse litigants were in question, it might be that that contention would raise an arguable point, but in which there would be at least a good deal to be said against it, as the case of *Quilter v. Mapleson*, 9 Q.B.D. 672, shews; in that case, the enactment there in question was passed after the judgment at the trial and before the hearing

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of the appeal, just as in this case, and that case was one between adverse litigants relying upon their strict legal rights; yet it was held that the enactment was retrospective, and, though passed after the judgment appealed against was made, the Court of Appeal had power, and ought, to give effect to it. How very much more so should that be in this case, in which the inquiry is made in the interests of the supposed lunatic and of the public only; if, for any of the reasons set out in the enactment, he is incapable of managing himself or his person, what excuse could be given for declining to give effect to the enactment; what excuse for introducing almost barbarous technicality; for compelling the parties to march down the hill merely to march up again at such a great loss in law costs? Having regard to the character and purpose of these proceedings, and having regard to the nature and extent of the jurisdiction of the High Court, it would, in my opinion, be quite an inexcusable practice for that Court to refuse to give effect to the later enactment merely because these proceedings were begun before it was passed. If the man need protection of his property, as he unquestionably does, it assuredly ought to be given if either enactment authorises it.

These observations apply equally to a new trial. What object can there be in that, with the man's own evidence of his incapability, in his conversation with the Judges, ever ready to conclusively prove his incapacity?

An application was made for leave to file affidavits, of some of the medical gentlemen who have given their evidence at the trial in favour of the man's soundness of mind, and of others, to the effect that the examination made by the Judges did not afford a fair test; that, as I understand it, the answers given were given when the man was tired, the examination was had under not sufficiently favourable circumstance, etc.; but do these gentlemen think a man's capacity is to be judged only by his words and acts when at his best; that in business matters he cannot be dealt with and advantage taken of him when not at his best? His best, and his worst, must be taken into consideration; and, as to the fairness of the examinations, I can have no manner of doubt that the learned Judges who were present at it are very much better judges of that than party witnesses who were not present: and it may be pointed out that the man's incapacity was shewn

at the very outset of the examination, in his evidence as to the deed of the farm to his wife. Gentlemen of the medical profession are not, generally speaking, considered the most competent in business matters; nor can I think that, without the least experience with a man in business matters, they are anything like as competent, as a rule, to speak as to the man's business capacity, as the every day business man, learned or unlearned, who has had such advantages, in such a case as this; and, I cannot but think, the affidavits intrinsically prove this. Let me give an instance; taking the affidavit which comes first to my hand, in which it is said, "I verily believe, from what I know of him, that he would regard further examinations by the Judges, on the occasion referred to, as a meddlesome interference with his business affairs and private rights, and this, I believe, would account largely for his not answering according to the fact:" that is to say, this learned gentleman believes that a man of sound mind and capable of managing his business affairs, knowing that the question of his capabilities in that respect was the subject of litigation, and that the Judges who were to determine the question, and to declare, in the most binding manner, whether he was or was not capable of managing his affairs, and if not to take the management of them out of his hands and commit it to others, and had come from Toronto to his house for the purpose of judging for themselves of his capability, would consider their action meddlesome interference and give untrue answers to them, as if desirous of being declared incapable; the logic, the plainest common sense of the thing, is surely against such an extraordinary belief; if that is the way the man would take to advance his interests in his other business affairs, to say the least of it, they could hardly be successful: indeed can any one but say that, if this medical gentleman's belief is true, it is pretty strong evidence of the man's incapacity? In view of such things as this, things which are not confined to this affidavit, there is at least some excuse for repeating the observations of Lord Shaftesbury upon his examination before a Royal Commission in the year 1859: "For my own part I do not hesitate to say, from a long experience, that, putting aside all its complications with bodily disorder, the mere judgment of the fact whether a man is in a state of unsound mind and incapable of managing his own affairs and going about the world, requires no

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medical knowledge. My firm belief is that a layman, acquainted with the world and mankind, can give not only as good an opinion but a better opinion than all the medical men put together." In this case, as is usual, the medical men are not all together, but are pretty equally divided in opinion, against one another.

I well remember a case in which the question was whether the father of a child had sufficient mental power to be intrusted with her care. A member of the medical profession, whose probity, ability, and sportmanship were known and admired throughout Western Ontario, had made an affidavit of the man's fitness; the man also had made an affidavit, and he was subpcœnaed for cross-examination, and the medical gentleman was also subpcœnaed, and attended. The examination went on smoothly for some time, but after that signs of weakness began to creep in, and soon it became apparent that the man's mental control was greatly impaired; without waiting to be asked a question, without any sort of attempt to bolster up his former opinion, the gentleman rose and asked leave to withdraw his affidavit, saying he was convinced that he had made a mistake, and desired to say, if it would be of any use to the Court, that he now thought the man incapable; though there was no more to shew it in that case than there is in the examination of the supposed lunatic in this case. All professional men are not partisans in giving evidence.

I would allow the affidavits to be filed for what they are worth. And would dismiss the appeal.

*New trial ordered; MEREDITH, J.A., dissenting.*

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## [DIVISIONAL COURT.]

RE DINNICK AND MCCALLUM.

D. C.  
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*Municipal Corporations—Buildings “on Residential Streets” of Cities—Limitation of Distance from Line of Street—Consolidated Municipal Act, 1903, sec. 541a—By-law—Validity—Application to Building on Corner Lot—Discrimination—Unreasonableness.*

April 15  
June 20

By sec. 541a of the Consolidated Municipal Act, 1903 (added by 4 Edw. VII. ch. 22, sec. 19), councils of cities are authorised to pass and enforce by-laws to regulate and limit the distance from the line of the street in front thereof at which buildings on residential streets may be built; such distance may be varied upon different streets or in different parts of the same street. A city by-law, passed pursuant to this enactment, provided that no building should be “built or erected on the lots fronting or abutting on both sides of A. road” (a residential street) “from St. C. avenue to L. road, within a distance of 40 feet from the east and west lines of the said road.” D. desired to build an apartment house at the north-east corner of St. C. avenue and A. road, with the main front and entrance on St. C. avenue, and nearer than 40 feet to the east line of A. road:—

*Held*, that the by-law was within the authority of this enactment.

2. Having regard to the natural meaning of the words “street in front thereof” and “buildings on residential streets,” and to the object of the Legislature, the proposed building would be a building on A. road and within the restriction imposed by the by-law; BRITTON, J., dissenting.
3. That the by-law was not discriminatory in its operation, nor so unreasonable that it should be declared invalid.

Opinion of RIDDELL, J., approved.

MOTION by W. L. Dinnick for a mandamus directed to the Corporation of the City of Toronto and the City Architect (McCallum) to issue a permit to the applicant for the erection of an apartment house on the north-east corner of Avenue road and St. Clair avenue, in the city of Toronto.

April 12. The motion was heard by RIDDELL, J., in Chambers.  
W. C. Chisholm, K.C., for the applicant.

H. Howitt, for the respondents.

April 15. RIDDELL, J.:—By the Act (1904) 4 Edw. VII. ch. 22, sec. 19 (adding sec. 541a to the Consolidated Municipal Act, 1903), it was provided that “the councils of cities . . . are authorised . . . to pass and enforce . . . by-laws . . . to regulate and limit the distance from the line of the street in front thereof at which buildings on residential streets may be built; such distance may be varied upon different streets or in different parts of the same street.”

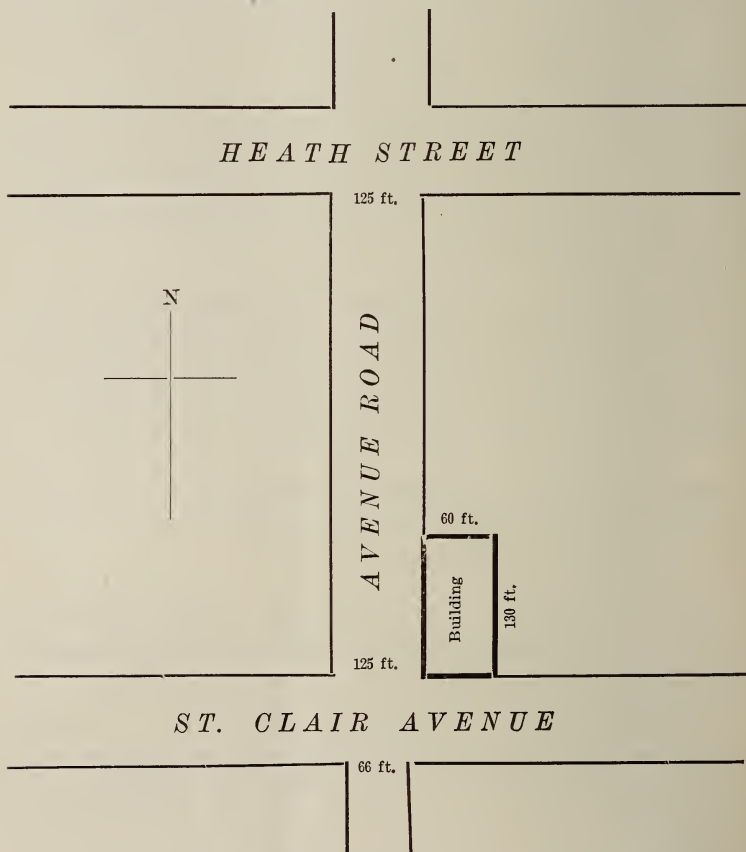
The Council of the City of Toronto, purporting to act under the powers given by this statute, in December, 1911, passed by-law

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No. 5891, containing the following provision: "No building shall hereafter be built or erected on the lots fronting or abutting on both sides of Avenue road from St. Clair avenue to Lonsdale road, within a distance of 40 feet from the east and west lines of the said road, and no person shall hereafter erect or build any such building in contravention of this by-law."

Avenue road is admittedly a "residential street," within the meaning of the Act.

Mr. Dinnick, being the owner of the block of land at the north-east corner of St. Clair avenue and Avenue road, desired to build an apartment house at the corner, 60 feet on St. Clair avenue and 130 feet on Avenue road (see rough plan.)



Drawing up all proper plans and specifications, he applied to the City Architect for a building permit, which was refused—solely

on the ground that the proposed building would be in violation of by-law 5891.

Upon motion for a mandamus, the city corporation did not insist upon any technical objection—and the real matters to be decided are the validity of the by-law and its application to the present case.

It is admitted that the building “fronts” on St. Clair avenue.

The first and substantial contention of the applicant is that the legislation does not empower the city council to pass a by-law prohibiting the erection of a building within a certain distance of a residential street, unless the proposed building “fronts” on the street.

I do not agree with that contention: the power is given to limit the distance of buildings from the line of the street in front of the proposed buildings; the street is in front of the building, indeed, but that does not necessarily imply that the part of the building which is in common parlance called the front should face or look toward the street.

Any side or face of a building is a front, although the word is more commonly used to denote the entrance side: New English Dict., *sub voc.* “Front,” p. 563, col. 3, para. 6. “Back-front,” “rear-front,” the “four fronts” of a house, are all terms in common use—and there is no reason why a building should not “front” on two, three, or four streets—or that two, three, or four streets should not be “in front thereof”—all such streets would, I think, “confront” the building: New English Dict., “Front,” p. 564, col. 1, para. 10 (a).

We must look at the object of the legislation. It must be plain that the whole object was to enable the city to make residential streets more attractive, etc., by preventing building out to the street line—it would make a farce of the legislation if persons were to be allowed to build with the gable ends of their houses toward the street and up to the line of the street, claiming that they did not front on the street, and, therefore, the street was not “in front thereof.” And it would be no less absurd to say that, if people could not build in that way in the middle of the block, they could at the corners. I am of the opinion that the power exists to prevent any buildings being placed within a distance (of course reasonable) of the line of a residential street.

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Then it is said that this is in effect an expropriation of the applicant's land on St. Clair avenue; but this is an argument to be advanced to the Legislature and to the council.

The by-law is, perhaps, not very well drawn—it is not lots through which Avenue road runs, and which, therefore, are “on both sides of Avenue road,” which are meant, but lots on each side. But the language is quite intelligible, and can fairly be made to cover the lot of the applicant. “East and west lines” must, of course, be read distributively. No objection can be taken to the prohibition to “build on the lots fronting or abutting on . . . Avenue road,” where the legislation authorises a prohibition to build on any lot within the fixed distance of the line of the street.

I should dismiss the motion, but that a decision of the Chief Justice of the King's Bench has been brought to my attention *City of Toronto v. Schultz*\* (1911), 19 O.W.R. 1013, which seems

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The first-named action was begun on the 19th August, 1911, by the Corporation of the City of Toronto, plaintiffs, against Robert H. Schultz, defendant. The plaintiffs' claim was “for an injunction to restrain the defendant from erecting a building at the north-west corner of Spadina road and Bloor street, in the city of Toronto, within twenty-five feet from the west line of Spadina road, in contravention of the provisions of by-law number 4535 of the City of Toronto.”

The second action was begun on the 1st September, 1911, by Robert H. Schultz, plaintiff, against the Corporation of the City of Toronto, defendants. The plaintiff's claim was “for a declaration that he is entitled to be granted a permit to erect a building on the north-west corner of Bloor street and Spadina road, and for a mandatory injunction for the issue of such permit.”

By-law No. 4535, passed by the city council on the 8th May, 1905, was in part as follows:—

“Whereas by the Municipal Amendment Act, 1904, the councils of cities and towns are authorised and empowered . . . to pass and enforce such by-laws as they deem expedient to regulate and limit the distance from the line of the street in front thereof on which buildings on residential streets may be built, and it is therein provided that such distance may be varied upon different streets or in different parts of the same street:—

“And whereas the parts of the streets hereinafter referred to are residential streets . . . :—

“Therefore, the Council of the Corporation of the City of Toronto enact as follows:—

“1. No building shall hereafter be built or erected on the lots fronting or abutting on each side of Spadina road, Walmer road . . . between Bloor street and Bernard avenue within a distance of 25 feet from the east and west lines of each of the said streets respectively . . . and no person shall hereafter erect or build any such building in contravention of this by-law. . . .”

The plaintiffs in both actions moved for interim injunctions in respect of the claims made by them.



to be decided the other way. I am not at liberty to disregard the Ontario Judicature Act, R.S.O. 1897, ch. 51, sec. 81 (2)†; but as, with the utmost respect, I “deem the decision previously given to be wrong and of sufficient importance to be considered in a higher Court,” I refer this case to a Divisional Court.

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An assistant in the office of the Architect for the City of Toronto stated on affidavit that he had charge of supervising the structural work for buildings, plans of which were submitted to the City Architect; that on or about the 10th July, 1911, Schultz left at the office of the City Architect plans for an apartment house building on the vacant lot at the north-west corner of Bloor street and Spadina road, in the said city; that the plans shewed the location of the proposed building to be closer than 25 feet to the west limit of Spadina road; that on the 13th July, 1911, notice in writing was sent to Schultz . . . and he was informed that the permit for the building could not be granted, by reason of the structure being shewn closer than 25 feet to the west limit of Spadina road, and reference was made to city by-law No. 4535.

Schultz stated on affidavit that he was the owner of the lands at the north-west corner of Bloor street and Spadina road, having a frontage on Bloor street of 82 feet 6 inches by a depth of 100 feet to a lane; that he purchased the lands in the latter part of the year 1909, and did not know until some time thereafter of the restriction alleged to be imposed by the by-law No. 4535; that the lands were assessed and taxed for their full frontage on Bloor street; that the lands are very valuable; that he duly made an application for a permit to erect an apartment house fronting on Bloor street upon his said lands, and filed plans and specifications in accordance with the building by-laws and regulations of the plaintiffs, but was refused a permit, on the ground only that his said building was shewn to be closer than 25 feet to the west limit of Spadina road; that, after giving the plaintiffs (the city corporation) reasonable notice and demanding that they should issue a permit, and not having within a reasonable time been granted the same, but being refused the same for the reason above given, he began preparations for the erection of the building.

Schultz also stated in his affidavit that a number of other buildings had been erected upon Spadina road, in contravention of by-law No. 4535, since the passing of that by-law.

In an affidavit, in reply, made by the Assistant City Architect, it was stated that prior to by-law No. 5400, passed on the 13th December, 1900, amending the city's building by-law No. 4861, the City Architect could not refuse permits for buildings, on the ground of their infringing other civic regulations, if the buildings complied with by-law No. 4861; but by-law No. 5400 gave the City Architect power so to refuse; and he could find no case in which a permit had been issued, since the passing of by-law No. 5400, for the erection of a house on Spadina road south of Bernard avenue, and he believed that no permit had been issued since that date.

September 7, 1911. Both motions came on for hearing before FALCONBRIDGE, C.J.K.B., in the Weekly Court at Toronto, and were, by consent, turned into motions for judgment in the respective actions.

*G. A. Urquhart*, for the Corporation of the City of Toronto.

*Grayson Smith*, for Schultz.

FALCONBRIDGE, C.J., at the conclusion of the argument gave judgment in favour of Schultz, holding that the restriction in by-law No. 4535 did not apply to the building which Schultz proposed to erect, fronting on Bloor street.

The action of the city corporation was dismissed with costs; and judgment given in Schultz's action for the relief claimed by him with costs.

† See now 2 Geo. V. ch. 17, sec. 10, assented to on the 16th April, 1912.

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May 15. The motion was reheard by a Divisional Court composed of BRITTON, TEETZEL, and KELLY, JJ.

W. C. Chisholm, K.C., for the applicant. In the first place, the by-law is invalid on its face, because it does not in its terms comply with the enabling Act. The Act refers to buildings fronting on a street, whereas the by-law deals with lots fronting on a street: *Re Kinghorn and City of Kingston* (1866), 26 U.C.R. 130, at p. 134; *Re Peck and Township of Ameliasburg* (1889), 17 O.R. 54; *Re Hay and Town of Listowel* (1897), 28 O.R. 332. Even if the by-law was validly drawn, it is not applicable to a case like the present. This building is not on Avenue road, but on St. Clair avenue, which is the street "in front thereof," within the meaning of the Act, and there is no restriction on that thoroughfare: *Connecticut Mutual Life Insurance Co. v. Jacobson* (1899), 75 Minn. 429, at p. 432; Murray's New English Dict., "Front." The by-law, in any event, is unreasonable and discriminatory in that its effect is to deprive many persons of the unrestricted use of their property: *Kruse v. Johnson*, [1898] 2 Q.B. 91.

H. L. Drayton, K.C., and H. Howitt, for the respondents. The cases cited as to variance have no applicability here. In all of them, the variations were in excess of statutory powers, whereas here the council did not go the full length of the authority conferred by the Act. As to the applicability of the by-law as it stands, that depends on whether the building can be said to be "on Avenue road." Is Avenue road "in front thereof"? We submit that any side or face of a building is the front: *Justices of Bedfordshire v. Commissioners for Improvement of Bedford* (1852), 7 Ex. 658, and at p. 665. St. Clair Avenue is to-day a residential street. And it would be a farcical state of affairs to think that the corner houses would be allowed to jut out, while the intervening ones were set back. There can be no doubt as to the object of the Legislature, which was to get a wide street. When the Legislature used the words "residential streets," the whole of a residential street was intended. The building in question is within the restriction imposed by the by-law. The by-law is in no sense unreasonable or discriminatory.

*Chisholm*, in reply.

June 20. TEETZEL, J.:—A motion by W. L. Dinnick for a

mandamus directed to the Corporation of the City of Toronto and the City Architect, to issue a permit to the applicant for the erection of an apartment house on the corner of Avenue road and St. Clair avenue, was heard before Mr. Justice Riddell, sitting in Chambers, and that learned Judge, being of opinion that, but for a decision of the learned Chief Justice of the King's Bench, in *City of Toronto v. Schultz*, 19 O.W.R. 1013, he should dismiss the motion, referred the same to a Divisional Court, under sec. 81 of the Judicature Act.

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By 4 Edw. VII. ch. 22, sec. 19, it was provided that "the councils of cities . . . are authorised . . . to pass and enforce . . . by-laws . . . to regulate and limit the distance from the line of the street in front thereof at which buildings on residential streets may be built; such distance may be varied upon different streets or in different parts of the same street."

Purporting to act under the authority conferred by this statute, the city council, in December, 1911, passed a by-law, number 5891, containing the following provision: "No building shall hereafter be built or erected on the lots fronting or abutting on both sides of Avenue road from St. Clair avenue to Lonsdale road, within a distance of 40 feet from the east and west lines of the said road, and no person shall hereafter erect or build any such building in contravention of this by-law."

That Avenue road is a "residential street," within the meaning of the Act, is not disputed.

Lonsdale road is its northern terminus; the section covered by the by-law was originally laid out at the unusual width of 125 feet; and a substantial portion of it has not yet been built upon.

The applicant, being the owner of a block of land at the north-east corner of St. Clair avenue and Avenue road, and desiring to build an apartment house on the corner 60 feet on St. Clair Avenue and 130 feet on Avenue road, the proposed front facing St. Clair avenue, prepared all proper plans and specifications, and applied to the City Architect for a building permit, which was refused, solely on the ground that the proposed building would be in violation of by-law 5891.

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The matter to be decided is as to the validity of the by-law, and its application to the present case.

The points urged against the by-law by Mr. Chisholm were: (1) it does not in its terms comply with the enabling Act; (2) even if its terms complied with the Act, it is not applicable to a case like the present; and (3) it is discriminatory in its operation, and unreasonable.

Upon the first point, the language of the authority is, "to regulate and limit the distance from the line of the street in front thereof at which buildings on residential streets may be built," while the by-law only prohibits building "on the lots fronting or abutting on . . . Avenue road . . . within a distance of 40 feet from the east and west lines of said road;" so that, as pointed out by Mr. Chisholm, if a fronting or abutting lot had a depth or width, measured from Avenue road, of less than 40 feet, a building erected on land adjoining such lot to the rear, although within 40 feet of the street line, would not be within the operation of the by-law, notwithstanding that such building might possibly be described as *on* Avenue road, within the meaning of the Act.

There is nothing in the material to shew that, in any survey of lots fronting or abutting on Avenue road, is there any lot in reference to which such an incongruous result might follow; but, even if such a result is possible, I do not think that the by-law can be held to be invalid for that reason. The statute does not require that the distance limited by the by-law shall be uniform, but expressly provides that "such distance may be varied upon different streets or in different parts of the same street."

Presumably, although perhaps not necessarily in every case, a building on a residential street must be built upon a lot "fronting or abutting thereon," so that, while it may be that the council, in limiting the restriction to buildings "on lots fronting or abutting on Avenue road," etc., instead of imposing the restriction generally to all buildings to be erected on that street, may not have gone the full length of the authority conferred by the Act, I think it has clearly kept within that authority; for, while the Act, no doubt, confers authority to impose the restriction in regard to all buildings to be erected on the street in question, it does not require the restriction to be imposed upon all buildings, and, as pointed



out, express authority is given to vary the distances in different parts of the street.

Then, assuming the by-law to be valid, is it applicable to the building in question? The answer to this depends upon whether when erected the building can be properly described as being *on* Avenue road, within the meaning of the words of the Act, "buildings on residential streets."

Mr. Chisholm argues that this building is on St. Clair avenue, and not on Avenue Road, and that that street, and not Avenue road, is "in front thereof," within the meaning of the Act.

The word "on" used in this connection, in its ordinary and natural meaning, signifies "In the relation of . . . environing, or lying along or by:" Standard Dictionary, *sub voc.* "on," p. 1228, col. 3, para. 4; and also "In proximity to, close to, beside, near:" New English Dictionary, *sub voc.* "on," p. 114, col. 2, para. 3.

Then as to the words "line of the street in front thereof," as pointed out by my brother Riddell, citing the New English Dictionary: "Any side or face of a building is a front, although the word is more commonly used to denote the entrance side. . . . 'Back-front,' 'rear-front,' the 'four fronts' of a house, are all terms in common use—and there is no reason why a building should not 'front' on two, three, or four streets—or that two, three, or four streets should not be 'in front thereof'—all such streets would, I think, 'confront' the building."

The manifest object of the Legislature was to enable councils of cities and towns to make residential streets more attractive, etc., by preventing buildings being placed out to the street-line; and it would largely defeat such purpose if a by-law could only be made applicable to buildings to be erected on inside lots, and not to buildings on corner lots. When the Legislature used the words "residential street," *primâ facie* the whole of such street must have been intended, and not merely the portion in front of inside lots; so that, in the absence of any reservation in favour of owners of corner lots, the street from end to end and from limit to limit must be included.

While a building at the corner of two streets is numbered on the street upon which its main entrance fronts, and is in common

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parlance spoken of as "on that street," it also lies along or borders on the other street, and in the relation of environing is also on that street, and such street would also be in front of that part of the building adjoining it.

Having, therefore, regard to what appears to me to be the natural meaning of the words "street in front thereof" and "buildings on residential streets," and to the object of the Legislature, I think the building in question, although the proposed entrance is from St. Clair avenue, would, nevertheless, be a building on Avenue road; and would, therefore, be within the restriction imposed by the by-law.

Then, is the by-law discriminatory in its operation, or is it so unreasonable that it should be declared invalid?

If it should transpire, which is very unlikely, that there are any lots fronting or abutting on Avenue road, less than 40 feet in depth or width, the by-law as worded might not, as pointed out above, apply to a building erected on adjoining land; and in that case the by-law might have the effect of discriminating in favour of such building; yet, as the council is entitled to vary the distance in any part of the street, and has limited the application of the by-law to buildings on lots fronting or abutting on Avenue road, as I think it had the right to do, I do not think the by-law is open to attack on this ground.

There remains the question whether the by-law ought to be held invalid for unreasonableness, in that its effect upon the applicant and others is to deprive them of the unrestricted use of their property, and in that it is limited in its operation to buildings on lots fronting or abutting on the street in question, in respect of both which matters I have already expressed the view that the by-law is within the power conferred by the Act.

Given the power to pass the by-law, the question of its reasonableness is, generally speaking, for the judgment and conscience of the council; and, except in extreme cases, it is well settled that the Court will not hold by-laws passed by municipal bodies, within the ambit of their authority, to be invalid for unreasonableness. This proposition was not contested by Mr. Chisholm, and is supported by *Kruse v. Johnson*, [1898] 2 Q.B. 91, cited by him, and by *Stiles v. Galinski*, [1904] 1 K.B. 615, in which Lord Alverstone, C.J., at p. 621, says: "On all practical matters,

provided they come within the ambit of the powers of the local authority as to making by-laws, the discretion of the local authority ought not, in my opinion, to be lightly interfered with, and only when it is quite clear that the by-law in question is in conflict with some legal principle. I agree with that which Lord Russell of Killowen, C.J., said in *Kruse v. Johnson (supra)*, that by-laws ought to be supported if possible, and that the Court ought to be slow to condemn as invalid any by-law on the ground of supposed unreasonableness."

See also *Leyton Urban District Council v. Chew*, [1907] 2 K.B. 283.

While this by-law may have the effect of depriving the applicant of making the most profitable use possible of his property, that is not—assuming that the by-law is authorised and was honestly passed in the public interest—any ground for holding it invalid for unreasonableness.

As stated by Wright, J., in *Simmons v. Malling Rural District Council*, [1897] 2 Q.B. 433, at p. 438: "I do not think that a by-law should be held unreasonable on the ground that in a particular case inconvenient consequences might result from its enforcement; it is the public interest as a whole which has to be considered." See also *Slattery v. Naylor* (1888), 13 App. Cas. 446, where it was held that a by-law made in pursuance of a Municipal Act, empowering councils to make by-laws for regulating the interment of the dead, is not *ultra vires*, by reason of its prohibiting interment altogether in a particular cemetery and thereby destroying the private property of the owners of burial places therein.

Judgment will, therefore, be dismissing the application with costs.

KELLY, J.:—At the close of the argument, I was of opinion that the applicant was not entitled to succeed. Further consideration has strengthened this conviction.

What the Legislature evidently had in view, when passing the Act giving the councils of cities and towns the power which the Council of the City of Toronto purported to exercise in this instance, was the improving and beautifying of the localities or districts to which by-laws such as that now in question would

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be made to apply. This intention of the Legislature would not be fully effected if the restriction against building applied only to inside lots, and did not include as well the lots or lands at the corners of the street.

The meaning to be given to the language of the Act and the by-law has been fully considered in the judgment of my brother Teetzel, with which I agree.

The lot or land of the applicant does not cease to abut on or front on Avenue road by the mere fact that the building intended to be erected thereon is so designed as to have its entrance from another street, and that the entrance will be from such other street only.

Moreover, in regard to the distance from the line of the street at which buildings may be built, there is power given by the Act to vary the distance in different parts of the same street; no such variation was provided for by the by-law in this case. In the absence of some express provision to that effect, I do not think this property is excepted from the operation of the by-law.

It was contended during the argument that the by-law works seriously to the disadvantage of the applicant. That is, no doubt, true; and the inclination would be to grant relief but for being prevented by the Act and the by-law. In many instances, legislation which, as is apparently the case here, is intended for the common benefit, or for the benefit of a considerable section of the public, operates as a disadvantage to one or other of the persons affected by it. That, however, does not of itself invalidate the legislation.

In my view, therefore, the application fails.

BRITTON, J. (dissenting):—The Council of the City of Toronto is authorised by 4 Edw. VII. ch. 22, sec. 19 (1904), to pass and enforce by-laws to regulate and limit the distance from the line of the street in front thereof at which buildings on residential streets may be built. Avenue road, as admitted, is a residential street. The power of the city in this particular matter is limited to passing a by-law to regulate and limit the distance from the line of Avenue road, in front of that road, at which buildings on Avenue road may be built.

The city council did pass a by-law on the 4th December, 1911, *viz.*, by-law No. 5891, the first clause of which is as follows: "No



building shall hereafter be built or erected on the lots fronting or abutting on both sides of Avenue road from St. Clair avenue to Lonsdale road, within a distance of 40 feet from the east and west lines of the said road, and no person shall hereafter erect or build any such building in contravention of this by-law."

Assuming, for the sake of argument, that this by-law was not in excess of the jurisdiction of the city, by reason of its prohibiting the building on lots fronting or abutting on Avenue road, then an interpretation must be given to the words "building on residential streets," that is, in this case, a building upon Avenue road. Is a building, 40 feet or less distant from the line of Avenue road, close to another street, and with the entrance to the building from that other street, and with no entrance to the building from Avenue road, a building upon Avenue road, within the meaning of the statute? I do not think so. Dinnick's proposed building is to be a building upon St. Clair avenue.

It may or may not be at a distance of 40 feet from St. Clair avenue—that is not in question here. Should the building to be erected facing or fronting on St. Clair avenue have as a lawn or garden all the land between the west side of it and Avenue road, enclosed by fences, one fence running from the corner of St. Clair avenue and Avenue road northerly, to the northerly limit of Dinnick's lot, could that be prevented by any by-law passed by the city by virtue of the estate cited? I think not—and that seems to me one way of testing the power of the city in the case under consideration.

I quite agree that, "if the by-law is reasonable, it ought to be supported, if possible, and that the Court ought to be slow to condemn as invalid any by-law on the ground of supposed unreasonableness." My reason for holding as I do is, that I cannot take the words "buildings on residential streets" as having any meaning other than as fronting upon or having access to them from the street in question. Restricting the right of the owner to a certain use of his property is a quasi expropriation of part of that property for the use of the city. It is of benefit to the city at large. The policy of the law is to allow cities, at the expense of the owners of property, to restrict and limit the rights of owners; but, when this is done, the restriction and limitation must be clearly within legislative authority. If the Legislature intended that the

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owner of a lot upon the corner of two residential streets cannot erect any building upon it, within the distance of a specified number of feet from the line of street, it should say so in clearer language than has been used in the Act relied upon by the city in this case.

In my opinion, the order for mandamus should go.

*Application dismissed; BRITTON, J., dissenting.*

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RE CANADIAN SHIPBUILDING CO.

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*Company—Winding-up—Claim of Liquidator to Ownership of Vessel in Course of Construction by Insolvent Company—Contract—Construction—Payment—Transfer of Ownership—Bills of Sale and Chattel Mortgage Act—Status of Liquidator to Invoke—"Creditor"—Bills of Sale—Order of Reference—Powers of Referee.*

The above-named company made an agreement with a navigation company to build a steamer for the navigation company for \$297,000. Payments were to be made every two months to the extent of 80 per cent. of the work done and material purchased by and delivered to the contractor for constructing the steamer—balance on completion—the contractor to provide all manner of labour, material, and apparatus. After the first payment, as the work went on, it was provided, "the property in the said steamer so far as constructed, and in all machinery belonging thereto and in all materials purchased and intended to be used for constructing the same or any part thereof, shall become vested in and be the absolute property of the owner"—i.e., the navigation company—"and the contractor shall and will then or at any time thereafter, at the request of the owner, execute and deliver to the owner such bill of sale or other assurance as the owner may be advised to be necessary to so vest said steamer and machinery and material in the owner, subject to the lien of the contractor upon the said steamer and its machinery and equipment for any unpaid balance . . . and subject to the possession of the said steamer remaining in and with the contractor until the owner is entitled to delivery in accordance with the provisions of this contract." The agreement was made on the 18th February, 1907; the steamer was to be built by the 1st October, 1907. The navigation company paid \$30,000 on account of the work done, materials furnished, etc.; and on the 4th November, 1907, the shipbuilding company made a bill of sale to the navigation company covering what had been done, and on the 27th November, 1907, another bill of sale. In January, 1908, an order was made for the winding-up of the shipbuilding company. The liquidator claimed the ownership of the work, alleging that the bills of sale were invalid as against him:—

*Held*, that the provision above-quoted operated in equity as a transfer of ownership, from the time of the first payment, of all the ship and materials, etc., without the execution of a bill of sale.  
*Holroyd v. Marshall* (1862), 10 H.L.C. 191, 9 Jur. N.S. 213, applied and followed.

2. That the liquidator, not being a creditor or a purchaser for valuable consideration, could not take advantage of the provisions of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1897, ch. 148, and other like statutes. Section 38 of that Act does not extend the meaning of "creditors" to liquidators.

*In re South Essex Estuary and Reclamation Co.* (1869), L.R. 4 Ch. 215, and *Re Canadian Camera and Optical Co.* (1901), 2 O.L.R. 677, explained and discussed.

3. That the Referee in the winding-up proceedings had the power, having regard to the terms of an order of reference set out below, to consider and determine the claim of the liquidator to the ownership of the work.

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APPEAL by the liquidator of the Canadian Shipbuilding Company Limited from a certificate of an Official Referee, to whom a reference was directed for the winding-up of the company under the Dominion Winding-up Act, of his finding against the claim of the liquidator to the ownership of an unfinished ship which the company was building for the Hamilton and Fort William Navigation Company Limited when the winding-up order was made.

June 20. The appeal was heard by RIDDELL, J., in the Weekly Court at Toronto.

*J. A. Paterson*, K.C., for the liquidator.

*H. E. Rose*, K.C., for the navigation company.

June 22. RIDDELL, J.:—The Canadian Shipbuilding Company, on the 18th February, 1907, made a contract to build a steamer for the Hamilton and Fort William Navigation Company Limited, for \$297,000. The shipbuilding company was paid \$30,000 on account of the work done, etc., etc., and on the 4th November, 1907, made a bill of sale of what had been done (I use popular language) to the navigation company. Then, on the 27th November, 1907, it made another bill of sale to the said company; and went into liquidation in January, 1908. The steamer was not finished; the navigation company, wishing to get possession of it, applied to the Court; and, on the 3rd March, 1909, the following order was made by the Chief Justice of the Common Pleas:—

“1. It is ordered that the petitioners do give security in the sum of \$40,000, by a bond of themselves and the Inland Navigation Company, to pay whatever amount (if any) it may be found that the liquidator of the Canadian Shipbuilding Company Limited now has a lien for, and for any damages which the liquidator may suffer by reason of the above-named petitioners taking possession of the said material, such amount to be promptly determined by the Referee in the winding-up proceedings.

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"2. It is further ordered that, upon the completion and delivery of such security, the said petitioners shall be at liberty to take possession of the ship (if any), and the material purchased and intended to be used for constructing the same, covered by the said bill of sale, as are now in the possession of the said liquidator.

"3. And it is further ordered that the parties hereto keep a true account of everything received by the said petitioners as possession is taken.

"4. And it is further ordered that, save as herein expressly provided for, the rights and liabilities of the Hamilton and Fort William Navigation Company and of the Canadian Shipbuilding Company and its liquidator do stand in the same position as they do now stand.

"5. And it is further ordered that the costs of this application be disposed of by the said Referee in the winding-up proceedings."

The navigation company took possession of the unfinished ship, etc.; and the Referee proceeded with the reference as directed.

The liquidator claimed the ownership of the work, basing his claim upon the proposition that the bills of sale were invalid as against him.

The Referee found against him, and he now appeals.

The first matter to be considered is, whether it was open to the Referee to consider this point at all—I think that his conclusion that he could, is entirely justified. There is no adjudication in the order of reference as to the ownership, but the rights of the navigation company and the insolvent company (and its liquidator) are presumed—the navigation company is allowed to take possession of the ship and materials, but that is all. The reference is to determine the amount of lien, if any, and any damages the liquidator may suffer by reason of the navigation company taking possession of the said material. In other words, if there be a lien, how much is it? And, if there be ownership, what damages for taking the property from the possession of the owner?

By the agreement, the shipbuilding company was to build a freight steamer for the navigation company by the 1st October,



1907, for \$297,000; payments to be made every two months to the extent of 80 per cent. of the work done and material purchased by and delivered to the contractor for constructing the steamer—balance on completion—the shipbuilding company to provide all manner of labour, material, and apparatus. As work goes on after the first payment, “the property in the said steamer, so far as constructed, and in all machinery belonging thereto and in all materials purchased and intended to be used for constructing the same or any part thereof, shall become vested in and be the absolute property of the owner [*i.e.*, the navigation company]; and the contractor [*i.e.*, the shipbuilding company] shall and will then or at any time thereafter, at the request of the owner, execute and deliver to the owner such bill of sale or other assurance as the owner may be advised to be necessary to so vest said steamer and machinery and material in the owner, subject to the lien of the contractor upon the said steamer and its machinery and equipment for any unpaid balance . . . and subject to the possession of the said steamer remaining in and with the contractor until the owner is entitled to delivery in accordance with the provisions of this contract.”

This provision operated in equity as a transfer of ownership, from the time of the first payment, of all the ship and materials, etc., without the execution of a bill of sale. There is, I presume, no difficulty as to that part of the ship and materials in hand *in esse* at the time of this payment; and I think there can be no doubt as to the rest.

In *Holroyd v. Marshall* (1862), 10 H.L.C. 191, 9 Jur. N.S. 213, T., owning certain machinery in a mill, sold it to H., remaining in possession. Desiring to repurchase it, he executed a deed declaring that it was the property of H., conveying it to B. in trust that, when he paid for it, it should be transferred to him; but, if he failed, then to be held in trust for H. T. also covenanted that all the machinery which should be placed in the mill, during the continuance of the deed, in addition or substitution for the original machinery, should be subject to the same trusts. T. sold some of the machinery, and bought other machinery instead, which he brought into the mill. H. did not take possession; T. got in low water; and a creditor of his seized under a *fi. fa.* H. filed his bill; Stuart, V.-C., held the *fi. fa.*

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invalid as against the deed, in respect of the added and substituted articles; the Lord Chancellor (Lord Campbell) reversed this decree: (1860), 2 DeG. F. & J. 596; and an appeal was had to the House of Lords. Judgment was reserved for more than a year and a second argument heard. The Lord Chancellor (Lord Westbury) said (p. 211): "If a vendor . . . agrees to sell . . . property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt . . . that the contract would, in equity, transfer the beneficial interest to the . . . purchaser immediately on the property being acquired. . . . Immediately on the new machinery and effects . . . being . . . placed in the mill, they . . . passed in equity to the mortgagees, to whom T. was bound to make a legal conveyance, and for whom he, in the meantime, was a trustee of the property in question." Lords Wensleydale and Chelmsford concurred in allowing the appeal.

In that case there was, not unlike this, a covenant that T. should "do all necessary acts for assuring such added or substituted machinery, implements, and things, so that the same may become vested accordingly." It was strongly argued that this express covenant must be taken as shewing that the property did not pass without a deed (see p. 225). On p. 204, Amphlett, on the first argument, is reported as saying *arguendo*: "Nothing whatever has been done for so vesting the added machinery, and therefore it has not vested;" and on the second argument (p. 207): "There must be a real (or if that was impossible) a constructive delivery of these new chattels in order presently to vest them in the appellants. There had not been any such delivery here. There ought to have been a new bill of sale of them, and a new registration of it." But the Lord Chancellor said (p. 209): "In equity it is not necessary for the alienation of property that there should be a formal deed of conveyance." Lord Chelmsford said (p. 225): "It seems to be neither a convenient nor a reasonable view of the rights acquired under the deed, to hold that for any separate article brought upon the mill a new deed was necessary, not to transfer it to the mortgagee, but to protect it against the legal claims of third persons."

This case has frequently been referred to and followed in our own Courts, *e.g.*: *Re Thirkell*, *Perrin v. Wood* (1874), 21 Gr. 492; *Mason v. MacDonald* (1875), 25 C.P. 435, at p. 439; *Coyne v. Lee* (1887), 14 A.R. 503; *Horsfall v. Boisseau* (1894), 21 A.R. 663, and others.

The statutes R.S.O. 1897, ch. 148 (the Bills of Sale and Chattel Mortgage Act), and the like, are appealed to by the liquidator. I do not think that the liquidator can take advantage of the provisions of these Acts—he is not a creditor or a purchaser for valuable consideration.

It is said that he stands for the creditors; but the Act does not speak of those who stand for the creditors, but of creditors; and sec. 38 of R.S.O. 1897, ch. 148, does not extend the meaning to liquidators, but only “to any assignee in insolvency of the mortgagor, and to an assignee for the general benefit of creditors.” Had it been intended to extend the meaning to cover liquidators, that could easily have been done.

Before the Act of 1892, 55 Vict. ch. 26, it had been held that an assignee for the benefit of creditors could not claim in the capacity of creditor any benefit from want of registration: *Parkes v. St. George* (1882), 2 O.R. 342, at p. 347, *per* Boyd, C.; *Kitching v. Hicks* (1884), 6 O.R. 739, *per* Proudfoot, J., at p. 745; *per* Osler, J., at p. 749, and cases cited. And, while an assignee in insolvency was held to be entitled to take advantage of the Act, that was so “decided upon the peculiar language of our late Insolvent Act:” *per* Osler, J., in *Kitching v. Hicks*, *ut supra*, at p. 749, citing *Re Barrett* (1880), 5 A.R. 206; *Re Andrews* (1877), 2 A.R. 24.

It has been considered in England in some cases, *e.g.*, in cases of fraudulent conveyances under the statute of 13 Eliz., that, if any fraud against creditors exists in a transaction to which the insolvent or bankrupt was a party, the assignee or trustee may take advantage of it, and that a deed which is void as against creditors is also void as against those who represent creditors. But it must be borne in mind that such deeds were contrary to the common law, and that the statute was merely an affirmance of the pre-existing common law.

In our case we have a statute which makes void perfectly legitimate and proper transactions, and this statute must be

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read strictly. I think that one who is not a creditor cannot claim as though he were a creditor, unless he can bring himself within the words of the Act.

I do not read the cases as excluding this view.

In *In re South Essex Estuary and Reclamation Co.* (1869), L.R. 4 Ch. 215, at p. 217, Lord Hatherley, L.C., says: "The official liquidator had therefore now to act for the benefit of creditors as well as of the shareholders. . . ." And in *In re Duckworth* (1867), L.R. 2 Ch. 578 (and other cases, including some in our own Courts), it is said that "the liquidator represents the creditors;" but, as Lord Cairns, L.J., says, L.R. 2 Ch. at p. 580, "The liquidator represents the creditors . . . but only because he represents the company." This is approved in the House of Lords by Lord Westbury in *Waterhouse v. Jamieson* (1870), L.R. 2 H.L. Sc. 29, at p. 38.

In *Re Canadian Camera and Optical Co.* (1901), 2 O.L.R. 677, it is indeed said that, in considering the statute now under examination, "it is necessary to bear in mind the position in which a liquidator stands in a compulsory winding-up, viz., that, while in no sense an assignee for value of the company, yet he stands for the creditors of the company, and is entitled to enforce their rights. . . ." The learned Judge cites *In re South Essex Estuary and Reclamation Co.*, *ut supra*—nothing, however, in that case, I venture to think, justifies the statement of law in the case in 2 O.L.R. just cited. What was held, and all that was held, was, that the solicitors for an insolvent company may be compelled to produce documents relating to the company upon application of the liquidator, but without prejudice to their lien for costs; and even this was founded on sec. 115 of the Companies Act of 1862—which may be read on pp. 1297, 1298, of the second volume of Lindley on Companies, 6th ed.—and which, it will be seen, gives the Court power to dispose of the papers, etc., of the company.

The dictum of Mr. Justice Street was not necessary for the determination of the case, as it was held that the creditors never had the right to treat the insolvent company as owner. I do not think that the provisions of a statute so severe as that respecting bills of sale, etc., are to be extended beyond the cases to which they are clearly applicable—and I think the liquidator is not a



creditor within the meaning of the Act. But, even if he were, the decision in the case just mentioned would seem to be adverse to him in respect of some of the goods at least. There W. delivered a lathe to the company, under condition that the property should not pass until the lathe was paid for in full; the company was wound up; the liquidator became possessed of the lathe, and sold it. W. claimed his "lien;" the Master in Ordinary allowed part only; but the Divisional Court held that the provisions of the Conditional Sales Act did not "help the liquidator in his capacity of representative of the creditors of the insolvent company, because the creditors never had a right to treat the bailee as owner." In our case "the materials purchased and intended to be used," after the execution of the agreement and after the payment of the first bi-monthly instalment, never became the property of the shipbuilding company as against the navigation company, but in equity became at once, upon purchase, the property of the navigation company.

It is unnecessary, however, to pursue this matter.

I have not said anything as to the validity of the bills of sale, but I am not to be considered as dissenting from the view of the learned Referee in that regard.

I think the appeal should be dismissed with costs.

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[DIVISIONAL COURT.]

SCOTT V. ALLEN.

*Husband and Wife—Authority of Wife to Pledge Husband's Credit for Necessaries—Limitation of Authority—Evidence—Corroboration—Action by Executrix—Running Account—Payments—Statute of Limitations.*

The executrix of S. sued the defendant for the balance of an account for goods alleged to have been supplied by S. to the defendant, upon the order of his wife:—

*Held*, upon the evidence, that the goods supplied were necessaries suitable to the station of the defendant and the style in which he lived; and, therefore, his wife's authority to bind the defendant should be presumed.

And *held*, that the presumption of authority had not been rebutted by the evidence; that corroboration of an alleged instruction to the defendant's wife not to run a bill was necessary, the action being brought by an executrix—and no such corroboration was furnished.

*Per RIDDELL, J.*:—The alleged limitation of authority was not made out, even if the defendant's evidence should have full credence and effect: his instruction to his wife was no more than a warning not to get into debt.

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*Held*, also, that the whole of the account—a running account beginning in 1882—was kept alive by payments, and that there never was a time when any part or item of it was barred by the Statute of Limitations; and, the debt being known and acknowledged, time being asked and accorded, payments in some instances having been made specifically with reference to it, and there having been no other debt, the plaintiff's claim was not barred.

The payment of a part is an act from which the inference may be drawn that the debtor intended to pay the balance, though no special reference is made thereto at the time; and a payment on account of a debt is such part payment.

*Ball v. Parker* (1876), 39 U.C.R. 488, and *Boulton v. Burke* (1885), 9 O.R. 80, followed.

APPEAL by the defendant from the judgment of the County Court of the United Counties of Leeds and Grenville, in favour of the plaintiff, in an action tried without a jury. The plaintiff sued, as executrix of R. A. Scott, deceased, for the balance of an account for goods alleged to have been supplied to the defendant, upon the order of his wife, by the deceased Scott.

June 13. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

*I. Hilliard*, for the defendant. The defendant's wife, now deceased, had no authority from the defendant to order the goods. In fact, the evidence shews that the defendant had expressly ordered her not to go in debt, and that Scott had notice that the defendant's wife had no right to pledge her husband's credit. Scott should have notified the husband: *Jolly v. Rees* (1864), 15 C.B.N.S. 628; *Debenham v. Mellon* (1880), 6 App. Cas. 24. The husband had supplied his wife with other means of payment: *Morel Brothers & Co. Limited v. Earl of Westmoreland*, [1903] 1 K.B. 64, [1904] A.C. 11; *Atkins v. Pearce* (1857), 26 L.J.C.P. 252. The Statute of Limitations applies, inasmuch as there was no evidence to shew that the account as kept in the testator's books was ever brought to the attention or knowledge of the defendant or his wife, and that all payments from 1900 down were payments upon the monthly statements only. Part payment must be applied to the particular part.

[The Chief Justice said that the members of the Court were agreed on the main question. The law was correctly laid down in *Eversley on Domestic Relations*, 3rd ed., pp. 312 and 313. They would hear counsel for the plaintiff on the question of the Statute of Limitations.]

*J. A. Hutcheson*, K.C., for the plaintiff. The evidence shews

that the account was fluctuating all the time, that many payments were appropriated on the old account. When there is no evidence of appropriation, the presumption is, that the payments were appropriated to the old account. At any rate, there was an account rendered in 1907, and payments made on account of it. The pass-book, which is in as an exhibit, shews this.

*Hilliard*, in reply. The evidence of the books, which were not rendered to Mrs. Allen, is not evidence against the defendant.

June 22. RIDDELL, J.:—The plaintiff is the executrix of the late R. A. Scott, who in his lifetime carried on business as a grocer; and she sues the defendant for the balance of an account for goods supplied by her testator. The defendant defends mainly on two grounds, viz.: (1) want of authority in his wife (now deceased) to order the goods; and (2) the statute.

We disposed of the first at the hearing of the appeal, holding that the law is correctly laid down in *Eversley on Domestic Relations*, 3rd ed., pp. 312, 313: "During cohabitation, there is a presumption arising from the very circumstances of the cohabitation of the husband's assent to contracts made by the wife for necessities suitable to his degree and estate; that is to say, a wife has an implied authority to pledge her husband's credit for such things as fall within the domestic department ordinarily confided to her management, and are necessary and suitable to the style in which her husband chooses to live. . . . In other words, where a wife is living with her husband, the presumption is that she has his authority to bind him by her contracts for articles suitable to that station which he permits her to assume, but that presumption may be rebutted by shewing that she had not such authority. This doctrine was laid down in the two important cases of *Jolly v. Rees*, 15 C.B.N.S. 628, 33 L.J.C.P. 177, and *Debenham v. Mellon*, 5 Q.B.D. 394, 6 App. Cas. 24, and is now settled law."

There was no doubt that the goods supplied were necessities suitable to the station of the defendant and the style in which he lived.

We also held that, in this action at the suit of an executrix, corroboration of the alleged instruction to the defendant's wife

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not to run a bill must be adduced—and that no such corroboration was furnished.

Speaking for myself, I would say that the alleged limitation of authority was by no means made out, even if the defendant's evidence should have full credence and effect—all that took place was a warning not to get into debt, not an unprecedented occurrence. It has been held that grumbling and remonstrance at a wife's extravagance is not a limitation of authority: *Morgan v. Chetwynd* (1865), 4 F. & F. 451, 457.

We reserved judgment to look into the question of the application of the statute.

On this branch of the case, also, I think the defendant fails. The present account began as far back as the 23rd February, 1882, at which time the parties had a settlement, and the account was paid in full. During the lifetime of Scott, the practice was for the wife of the defendant to buy groceries and make monthly payments, generally precisely the amount of the month's purchases—but sometimes a little more or a little less; if less, the running balance—for it was all one running account—was increased; if more, diminished. But, after the death of Scott, in June, 1907, and in August, 1907, the account was sent to her in full, *i.e.*, a statement of the whole balance. Mrs. Scott, the plaintiff, was under the impression that this was done in June, 1907; but it is clear that she has made a mistake in the date—and, indeed, she acknowledges it on cross-examination. That the account was sent is abundantly proved, not only by the plaintiff, but also by the bookkeeper, by Mrs. Birks and by the daughter of the defendant. (It is indeed actually produced at the trial by the defendant (exhibit 8); see also exhibit 4). This witness says that her mother received the account, that it came as a great shock and surprise to her—"this large account, she did not know where it ever arose from."

Mrs. Allen then went to the plaintiff and asked her not to crowd them for the account—that she would pay it all. This is established by the evidence of the plaintiff and of Mrs. Birks—and the promise seems to have been repeated at different times.

Payments were made from time to time by Mrs. Allen upon this account; the plaintiff ceased to keep a shop, and the payments were not in whole or in part on goods bought at or about



the time. Even after the death in 1909, her daughter, who then was put in charge of the defendant's household affairs, made a few payments, and doubtless would have continued doing so had not the defendant put a stop to it.

I have not thought it necessary to go through the account from the beginning: we were told by counsel for the plaintiff that the whole account from beginning to end was kept alive by payments, and that there never was a time when any part of it—or any item of it—was barred by the statute. While this was denied by counsel for the defendant, we were not pointed to any period as supporting his contention; and the course of dealing, in the periods I have examined, make it most probable that the plaintiff is right. Since *Boulton v. Burke* (1885), 9 O.R. 80, it cannot be successfully argued that the payment of a part is not an act from which the inference may be drawn that the debtor intended to pay the balance, though no special reference is made thereto at the time of such part payment; or that a payment on account of a debt is not such part payment: *Ball v. Parker* (1876), 39 U.C.R. 488, and cases cited there and in 9 O.R. 80. Here the case is stronger—the debt was known and acknowledged; time was asked and accorded; and the payments were, at least in some instances, made specifically and explicitly with reference to it—and there was no other debt.

The appeal should be dismissed with costs.

FALCONBRIDGE, C.J.:—I agree.

BRITTON, J.:—There is evidence to warrant fully the findings of fact of the learned County Court Judge; and upon the hearing of this appeal we were satisfied of the original liability of the defendant for the purchases by his wife—now deceased—but decision was reserved upon the question of whether the plaintiff's claim is barred by the Statute of Limitations. I am of opinion that the payments from time to time by the wife of the defendant were upon the whole running account so as to keep the claim alive. When the wife overpaid the current account for purchases during the month, she intended such overpayment to apply generally on the indebtedness. Even if she made no specific application of such sum as overpaid the month's purchases, the creditor, Scott, could apply it generally, so long as

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the account upon which the payment was applied was not statute-barred. There was—and in time—such application of the payments. It is rather hard that now, after the death of his wife and after the death of the creditor, Scott, the defendant should be called upon to pay this large account—when at least \$100 of it was owed as long ago as the 20th December, 1901; but such is the law, and the defendant must submit. As the wife, living with her husband, had the right to pledge her husband's credit for necessities, then she had the right to make payments from time to time, so as to prevent the claim being barred by the Statute of Limitations—and the defendant is bound by what his wife did, in acknowledging the correctness of the account as finally rendered, and by the payments thereon subsequently made by her.

*Appeal dismissed with costs.*

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[BOYD, C.]

YOUNG V. CARTER.

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June 24.

*Contract—Renewal of Lease—Action by Lessor to Set aside—Absence of Pressure or Coercion—Execution by Lessor when in Prison under Conviction for Indictable Offence—Status of Convict—Freedom to Contract—Criminal Code, sec. 1033—Imperial Forfeiture Act.*

A convicted offender serving his term may deal with his goods and lands as other men who are free from custody may deal with theirs; and no disability or restraint is put upon the convict, so far as dealing with his property is concerned, beyond that which attaches to other owners.

Section 1033 of the Criminal Code, R.S.C. 1906, ch. 146, discussed.

The Forfeiture Act, 33 & 34 Vict. ch. 23 (Imp.), has no direct application to the state of affairs in Canada, and is not in force in Canada.

*Dumphy v. Kehoe* (1891), 21 Rev. Leg. 119, approved and followed.

The plaintiff's action to set aside a renewal lease of hotel premises, executed by him when in prison serving a sentence for perjury, was dismissed, the plaintiff being free to deal with his property, and no case having been made out for relief on the ground of his being overborne by threats or pressure so that he was coerced into signing the document.

ACTION to set aside a lease of hotel premises made by the plaintiff to the defendants for three years from the 1st May, 1910, in renewal of a former lease.

The renewal lease was executed by the plaintiff on the 15th August, 1910, while he was serving a term of imprisonment in a penitentiary. He was released on parol in January, 1911; and the action was begun in April of that year.

June 17. The action was tried before BOYD, C., without a jury, at Fort Frances.

*G. S. Bowie and F. Hugh Keefer*, for the plaintiff.

*A. D. George*, for the defendants.

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June 24. BOYD, C.:—The plaintiff seeks to undo the renewal of a lease of hotel premises made by him to the defendants for three years from the 1st May, 1910. The renewal of the prior lease between the same parties was dated the 7th April, and was executed by the plaintiff on the 15th August, 1910, while he was serving a term of imprisonment in the penitentiary at Stony Mountain, Manitoba. The nature of his offence is not disclosed in the plaintiff's evidence; but I am told that it was perjury. He was released on parol in January, 1911; and this action was brought in April of that year.

No case was made out at the trial for relief on the ground of the plaintiff being overborne by threats or pressure so that he was coerced into signing the document. There was a mortgage upon the property, and foreclosure was threatened if the interest was not paid, and there was no way of paying the interest except out of the rents, and the tenants would not pay unless they obtained a renewal for three years at the same rent, and the liquor license for the year was about expiring and needed to be looked after if the hotel was to retain its chief value. All this combination of circumstances was considered by the plaintiff, and he found that (handicapped as he was under corporal confinement) the best thing to be done was to accept the proposition of the tenants. He was told by letter of their solicitor that, if he did not wish to sign, he must return the proposed renewal which they had tendered; upon which he added a clause to the document and signed it and sent it back so executed. Evidence was also given that the rent was, all circumstances considered, a fair rent; and, though more is now offered, that is probably the result of improved conditions and prospects in Fort Frances, where the hotel is situate.

I reserved judgment upon a ground of defence which sounded like an anachronism. The plaintiff pleaded that, being a convict undergoing sentence, he was, at the date of execution, in-

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competent to contract, and for this reason asks to have the renewal lease declared null and void. His term of imprisonment was for two years from November, 1909, and would have expired in November, 1911, but he was released (as already said) on parol early in that year. He was, no doubt, in actual custody and incarcerated at the time he signed; but did this incapacitate him from dealing with his property?

It is not necessary to deal with the old-time distinctions between attainder and forfeiture, the one pertaining to high treason and capital offences, and the latter to felonies of a less flagrant character. Felony generically meant a crime to be punished by forfeiture of lands and goods, to which death was generally superadded. But this method of punishment by depriving the convicted offender of lands and goods has been distinctly put an end to by the Canadian Code, and the property is left to the convict unaffected by any restrictive provisions. This amendment of the criminal law is in pursuance of the general plan of simplifying its provisions and of abolishing distinctions of obsolete and embarrassing character, which may well be displaced by the more humane policy of modern civilization.

The present English law is cited for the plaintiff; but it has really no direct application to the state of affairs in Canada. By the Forfeiture Act of 1870, 33 & 34 Vict. ch. 23 (Imp.), it was provided that no conviction or judgment of or for any treason or felony should cause any attainder or corruption of blood or any forfeiture or escheat (sec. 1); and then it provided for the appointment by the Crown of an administrator of a convict's property; and it also declared that every convict should be incapable (during his servitude) of alienating or charging his property or of making any contract (sec. 8). But, even as to this Act, the effect is said to be that it leaves a convict for felony in possession of his property, just as the common law left a convict for misdemeanour in possession of his property: Lush, L.J., in *Ex p. Graves* (1881), 19 Ch.D. 1, at p. 5.

Our legislators have had an eye on the English statute, for they have adopted the remedial provisions of sec. 1 into our Criminal Code, where it appears as sec. 1033 (R.S.C. 1906, ch. 146), where almost the identical language is used, viz., that no conviction or judgment for any treason or indictable offence



shall cause any attader or corinruption of blood or any forfeiture or escheat. The variation from the word "felony" in the English Act to the phrase "indictable offence" in the Code, is because of sec. 14 of the Canadian Code, whereby the distinction between felony and misdemeanour is abolished, and all are treated as indictable offences. The grade of crime is with us determined by the gravity of the offence and the degree of punishment attached.

The effect of this section of the Code is equivalent to that of the English Act, leaving undisturbed in the possession of the convict all his property. The law in Canada has not gone further, as has been done in England, so as to interpose certain obstacles on the action of the convict with respect to his property and to vest the administration thereof in a statutory official. A convicted offender serving his term may deal with his goods and lands as other men who are free from custody may deal with theirs; and no disability or restraint is put upon the convict, so far as dealing with his property is concerned, beyond that which attaches to other owners.

I find that the point has been expressly decided by Mr. Justice Jetté in *Dumphy v. Kehoe* (1891), 21 Rev. Leg. 119, that the Imperial statute relied upon by the plaintiff, 33 & 34 Vict. ch. 23, is not in force in Canada: pp. 126, 127. The other aspects of his decision have been superseded by the repeal of the clauses of the R.S.C. 1886, ch. 181, secs. 36 and 37, by sec. 981 of the Criminal Code, 1892.

The result is, that the plaintiff's action fails in all respects and must be dismissed with costs.

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[MIDDLETON J.]

MALOUGHNEY v. CROWE.

*Vendor and Purchaser—Contract for Sale of Land—Completed Agreement—Statute of Frauds—Memorandum in Writing—Parol Variation—Specific Performance.*

Where by law a written contract is necessary or a parol contract is required to be evidenced by writing, a subsequent parol variation may be ignored, and specific performance of the original agreement adjudged; or, if the plaintiff admits the parol variation, and the defendant desires to avail himself thereof if specific performance is awarded, the Court will withhold specific performance unless the plaintiff assents to yield to the defendant any advantage which he is entitled to under the modification.

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Review of the authorities.

Where the plaintiff and defendant entered into an agreement, complete and sufficient in all respects, for the sale by the defendant and purchase by the plaintiff of land, which agreement was evidenced by a receipt or memorandum, sufficient to satisfy the Statute of Frauds, written and signed by the defendant after the agreement was made, and by a subsequent parol agreement a variation was made in some of the terms, specific performance of the original agreement was adjudged.

ACTION by the purchaser for specific performance of an agreement for the sale of land.

June 19. The action was tried before MIDDLETON, J., without a jury, at Ottawa.

*G. D. Kelley*, for the plaintiff.

*J. E. Caldwell*, for the defendant.

June 24. MIDDLETON, J.:—I accept the plaintiff's evidence in this case, and where there is a conflict between the parties I give it the preference.

The plaintiff called at the residence of the defendant, for the purpose of purchasing, if possible, the property in question. He asked the defendant's price. The defendant said \$5,500. The plaintiff unsuccessfully endeavoured to beat this price down; but, being informed that \$5,499.99 would not buy the place, agreed to purchase it for the sum demanded, and paid \$10 on account.

I think this was a completed agreement.

Thereafter, the defendant suggested the giving of a receipt, and he prepared exhibit 1. This receipt, I think, correctly states the terms of the bargain, and is sufficient to answer the Statute of Frauds.

After the receipt had been given, the plaintiff—not realising that he would as a matter of law be entitled to possession, upon payment of the price as stipulated, *i.e.*, within ten days—asked the defendant when he would be given possession. The defendant then stated that he did not intend to give possession for a month; whereupon some discussion took place as to the unfairness of this intention, the plaintiff thinking it unreasonable that he should have to pay the whole price in ten days and not receive possession for thirty days. Finally, the parties agreed that, upon the plaintiff paying “a substantial sum” within the ten days, he should not be called upon to pay the balance of the price until the defendant was ready to yield possession.

This agreement constituted, I think, a subsequent parol agreement, modifying the former arrangement in the manner indicated.

When the parties met in Mr. Scott's office later for the purpose of closing the transaction, the defendant demanded \$1,000 as the "substantial sum" to be paid; and the plaintiff assented to this.

A new difficulty had in the meantime arisen. A real estate agent, in whose hands the property had been, appeared upon the scene and wanted commission. The defendant insisted on this commission being assumed by the plaintiff. The plaintiff would not assent. This, I think, was the real bone of contention.

The defendant then sought to recede from the parol agreement giving the extension for the payment of the balance of the purchase-money, in consideration of the delay in giving possession; and, although the plaintiff stated that he was ready to pay the whole price if need be, the parties parted; and, at a subsequent meeting, when the controversy was renewed and carried through practically the same phases, nothing was done. The plaintiff throughout adhered to the position that he should have possession when he paid the whole price. The defendant throughout adhered to the position that, apart from all other difficulties, he would not convey unless the plaintiff would indemnify him against the claim of the agent.

The plaintiff was able to pay, as he had a substantial sum of money in his own possession, and his father was a man of means, and stood ready to advance all that was necessary to complete the bargain. The defendant had no foundation whatever for his claim that the plaintiff should pay the real estate agent's commission; and his whole conduct in attempting to repudiate the bargain is discreditable. He has, however, for his refuge the last refuge of many dishonest men—the Statute of Frauds.

Upon the argument no authority was cited by either side directly dealing with the question which now arises. This is not a case of attempting to enforce an agreement some of the terms of which only are disclosed in the written evidence of the agreement. It is a case of an agreement complete and sufficient in all respects, fully evidenced by the subsequent written receipt or memorandum, with a subsequent parol agreement dealing with some of the terms.

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The result of the authorities is, that where by law a written contract is necessary or a parol contract is required to be evidenced by writing, the subsequent parol variation may be ignored, and that specific performance may be granted of the original agreement; or, if the plaintiff admits the parol variations, and the defendant desires to avail himself of these variations if specific performance is awarded, the Court will withhold specific performance unless the plaintiff assents to yield to the defendant any advantage which he is entitled to under the modification.

In the earlier cases a distinction was attempted to be drawn between the 4th and the 17th sections of the statute: the 4th providing that "no action shall be brought;" and the seventeenth, that "no contract . . . shall be allowed to be good." But the tendency is now to construe the sections as being substantially equivalent in this respect. As put by Lord Blackburn in *Maddison v. Alderson* (1883), 8 App. Cas. 467, 488: "It is now finally settled that the true construction of the Statute of Frauds, both the 4th and the 17th sections, is not to render the contracts within them void, still less illegal, but to render the kind of evidence required indispensable when it is sought to enforce the contract."

Statements contained in some of the earlier cases, in which the expression used is that the contract is void, or that writing is necessary to make the contract, must be treated as not being strictly accurate, and the cases must be read in the light of the passage quoted.

*Noble v. Ward* (1867), L.R. 2 Ex. 135, states the principle applicable, although it is a decision upon the 17th and not the 4th section. There there was a complete contract for the sale of goods above £10 in value, to be delivered at a future time. Before the time for delivery arrived, the parties made a parol agreement extending the time. It was held that the parol agreement, being invalid under the statute, did not effect an implied rescission of the former contract. This judgment was based upon the principle that the parties could not be taken to have intended to destroy the contractual rights under the first agreement save by the substitution of an enforceable modification of the original agreement.

The language of Parke, B., in *Moore v. Campbell* (1854), 10 Ex. 323, 332, is quoted with approval where he says: "If a new *valid* agreement substituted for the old one before breach would



have supported the plea, we need not inquire, for the agreement was void, there being neither note in writing, nor part payment, nor delivery, nor acceptance."

*Stowell v. Robinson* (1837), 3 Bing. N.C. 928, is a case where the same principle was applied to an action on a contract within the 4th section. By written agreement an interest in land was to be sold. A day was definitely fixed for the completion of the purchase. By a parol agreement made subsequently, the parties undertook to substitute a new day for the completion. It was held that this attempt to engraft a modification upon the written contract was abortive. Tindal, C.J., stated (p. 937): "Can the day for the completion of the purchase of an interest in land, inserted in a written contract, be waived by a parol agreement, and another day be substituted in its place, so as to bind the parties? We are of opinion that it cannot . . . We cannot get over the difficulty which has been pressed upon us, that to allow the substitution of a new stipulation as to the time of completing the contract by reason of a subsequent parol agreement between the parties to that effect, in lieu of a stipulation as to time contained in the written agreement signed by the parties, is virtually and substantially to allow an action to be brought on an agreement relating to the sale of land partly in writing signed by the parties, and partly not in writing, but by parol only, and amounts to a contravention of the Statute of Frauds."

In that case the plaintiff could not succeed unless he could rely upon the variation; so the case differs in that respect from the case now in hand; but, I think, the principle applies: for the statute is available to either party, and prevents the new contract being given in evidence at all, save for the purpose of affecting the conscience of the Court, which may in its discretion refuse to give specific performance if the party seeking its aid withholds from his opponent the benefit of the parol variation. Save as to this, the operation of the statute is the same in law and in equity. See *Emmet v. Dewhurst* (1851), 3 Macn. & G. 587.

*Goss v. Lord Nugent* (1833), 5 B. & Ad. 58, is a case very similar to *Stowell v. Robinson*. The contract was a contract with respect to real estate; it was duly evidenced by writing; there was a parol variation, on which the plaintiff, the vendor, had to rely for success. It was held, on the same principle, that he failed.

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In Halsbury's Laws of England, vol. 7, p. 422, the situation is thus summed up: "If the original contract is one which is required by law to be made in writing, it cannot be varied by a new verbal agreement, even if the variation relates only to a part of the contract which, if it stood by itself, would not be required to be in writing. But in such a case the contract can be rescinded altogether by a verbal agreement. If the original contract, though made in writing, is one which is not required by law to be made in that form, it can be varied by a verbal agreement."

Where this paragraph speaks of a contract "required to be in writing," the learned author clearly means a contract "required to be evidenced by writing;" as the cases shew, and as a reference to this paragraph in a later portion of the same treatise indicates. On p. 528 it is said that parol evidence may be admitted "to prove that a written contract has been rescinded or varied by a subsequent oral agreement, provided that proof of the oral agreement is not excluded by any statute: *e.g.*, by the Statute of Frauds (29 Car. II. ch. 3). See p. 422 *ante*."

Leake on Contracts, 6th ed., p. 583, after examining the authorities at law, states: "Where a plaintiff claims specific performance of a written contract, at the same time stating and offering to submit to subsequent parol variations, the Court will decree specific performance with the variations if the defendant is willing to accept the same; and if not, according to the original contract;" citing for this *Robinson v. Page* (1826), 3 Russ. 114, 121—a case which abundantly justifies the text.

Under these circumstances, I think the plaintiff is entitled to judgment for specific performance, with costs. If any difficulty arises in working out the details, I may be spoken to; and, if necessary, a reference may be directed; but I desire to avoid all unnecessary expense.

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[MIDDLETON, J.]

SIBBITT v. CARSON.

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June 24.

*Principal and Agent—Agent's Commission on Sale of Land—Contract—Time-limit—Sale Effected after Expiry—Introduction of Purchaser by Agent.*

To entitle an agent to a commission or remuneration for his services in bringing about a sale of land for his principal, the mere finding of a purchaser is not enough; there must be a contract to pay; and the terms of the contract, including all limitations as to time, must govern.

On a Saturday, the defendants put their land in the hands of the plaintiff, a land agent, for sale at \$50,000, upon what was called an exclusive agency or option, which was limited in time and would expire on the following Monday at two o'clock. The defendants afterwards extended the time till the following day, but the plaintiff failed to find a purchaser. Subsequently the defendants sold the land, for \$50,000, to G. and another. G.'s attention had been directed to the land by the plaintiff, who had endeavoured to procure G. to make one of a syndicate to buy the land. G. had begun negotiations with the defendants after the expiry of the original time-limit but before the expiry of the extended time:—

*Held*, that the plaintiff was not entitled to recover in an action for commission on the sale to G. and his associate.

*Burchell v. Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614, and *Stratton v. Vachon* (1911), 44 S.C.R. 395, distinguished.

ACTION by a real estate agent to recover commission.

June 17. The action was tried before MIDDLETON, J., without a jury, at Ottawa.

*R. G. Code*, K.C., for the plaintiff.

*G. F. Henderson*, K.C., for the defendants.

June 24. MIDDLETON, J.:—Further consideration confirms the impression I formed at the hearing, that the plaintiff fails in the action.

The defendants Carson and Bingham owned land on Albert street. On the 23rd February, Bingham had some conversation with Sibbitt (the plaintiff) in his office as to the terms on which he would undertake the sale of the property. Nothing was concluded then. On the next day, Saturday the 24th, after consulting with his partner, Bingham again called, and placed the property with the plaintiff at \$50,000, upon what was called in the evidence an exclusive agency or option, which was limited in time and would expire on the Monday at two o'clock. This time was undoubtedly very short; but, owing to some excitement with reference to real estate in this particular locality, and to the fact that some properties in the immediate vicinity had changed hands

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several times, each time at an increased price, and owing to the extremely optimistic disposition of the plaintiff, he assented to take the property upon these terms; and forthwith endeavoured to find purchasers or to arrange a syndicate to take over the property.

An option or agency of longer duration was sought. A document giving an option until the 29th was prepared and presented for signature; but the signature was promptly and emphatically refused.

Just before the expiry of the time-limit, the plaintiff communicated with the defendants, and was given until 2 p.m. next day to complete his arrangements. In the meantime, the plaintiff had made some endeavour to find purchasers, and had failed. Various suggestions as to exchange were refused by the defendants.

During the search for a purchaser, the plaintiff spoke to Mr. Grant, and obtained from him a verbal agreement to take some interest in a syndicate to be formed. Grant had heard of the property when offered for sale some time earlier than this at a smaller price, and was willing to take some share, if acceptable co-adventurers could be found. A dispute ultimately arose between the plaintiff and Grant as to the amount of his contribution; and this ended by Grant withdrawing and declining to have anything further to do with the plaintiff. The plaintiff then made an endeavour to find some one who would take Grant's place in the proposed syndicate; but, as already stated, his efforts proved abortive.

In the meantime Grant, having had his attention thus drawn to the property, placed himself in direct communication with the defendants. This was after the expiry of the original option at two o'clock on Monday, but before the extension until two o'clock on Tuesday was up. Nothing further was done. The defendants communicated with the plaintiff at the expiry of the time limited, and he admitted his inability to find a purchaser. Subsequently the defendants sold the land for the stipulated price to Grant and a co-adventurer.

The plaintiff bases his claim upon the fact that the property was sold, immediately after the expiry of the time-limit, to Grant, and the property had been introduced to Grant's consideration by him.



The negotiations leading to the sale to Grant and his *confrère* were quite independent of any negotiations between the plaintiff and Grant. The case is not one where the owner is endeavouring to defeat the agent's right by himself taking up and concluding negotiations with a purchaser found by the agent. It differs in many important respects from the reported cases.

The point which appears to me to be vital is, that the plaintiff's right must rest upon his contract. The agreement which he made was one which entitled him to a commission if he procured a purchaser by the time limited. In this he failed; and the parties were, therefore, entirely at large, so far as any contractual or other relationship is concerned.

The mere finding of a purchaser is not enough; there must be a contract to pay; and the terms of the contract, including all limitations as to time, must govern.

The cases relied upon by the plaintiff do not appear to me to help him. In none of them was there a limitation of time for the finding of the purchaser. *Burchell v. Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614, was a case of a general agency. The plaintiff found the purchaser, and was regarded as the efficient cause of the sale, which was negotiated and carried on behind his back by the principal. *Stratton v. Vachon* (1911), 44 S.C.R. 395, is upon precisely the same lines, affirming the right of the agent to his commission when he brings the parties into relation, and a contract ultimately results. Again, there was no time-limit.

This is quite apart from the alternative defence suggested by the defendants here, that, upon the facts, the plaintiff could not be regarded as having in any way brought about this particular sale. The plaintiff's suggestion to Grant was to take a \$5,000 interest in a \$50,000 purchase; the plaintiff to supply the capital to take up the remaining shares. The transaction which was carried out was a sale to Grant, and to another with whom the plaintiff had no connection, of the entire property for the \$50,000. The plaintiff was not instrumental in any way in bringing this about, and is not in fairness entitled to claim commission upon this transaction.

*Rice v. Galbraith* (1912), ante 43, indicates that my brother Latchford had present to his mind what seems to me to be the vital point in this case, when he says, in deciding in the plain-

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tiff's favour there (p. 46): "No limit as to time was imposed when authority to find a purchaser was given."

Action dismissed with costs.

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[BOYD, C.]

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KERLEY V. LONDON AND LAKE ERIE TRANSPORTATION CO.

June 25.

*Constitutional Law—Ontario Railway Act, 1906, sec. 193—Proclamation of Governor-General Confirming—Dominion Railway Act. R.S.C. 1906, ch. 37, sec. 9—Intra Vires—Railway Company Incorporated by Dominion Statute—Electric Railway—Work Declared to be for General Advantage of Canada—Running Electric Cars on Sunday—Penalties under Ontario Statute.*

The defendants were incorporated by Dominion statute 9 & 10 Edw. VII. ch. 120. On the ground, their line of electric railway extended only sixteen miles in the Province of Ontario, from London to Port Stanley, on Lake Erie; but power was given by the statute to establish a line of lake steamers to communicate with the State of Ohio at Cleveland; power was also given to construct various ramifications within Ontario; the undertaking was declared to be a work for the general advantage of Canada; and power was given to hold, maintain, and operate the railway subject to the provisions of the Dominion Railway Act, R.S.C. 1906, ch. 37. Neither that statute nor the incorporating Act prohibited the running of cars on Sunday; and the cars were run on the 11th, 18th, and 25th days of December, 1910, contrary to sec. 193 of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30:—

*Held*, that the defendants' road was a local concern, with no such connection as would constitute it part of "a continuous route or system," and that the defendants' traffic was not "through traffic," within the meaning of the Dominion Railway Act, sec. 9; so that the road, though declared to be a work for the general advantage of Canada, was yet, by virtue of the said sec. 9 (the original of which was 4 Edw. VII. ch. 32), subject to sec. 193 of the Ontario Railway Act, which was ratified and confirmed by proclamation of the Governor-General in Council of the 8th December, 1906, as authorised by the said sec. 9.

And *held*, that the conjoint legislation of the Dominion Parliament and the Ontario Legislature by the above-mentioned enactments was *intra vires*; and that the Court was justified in exacting penalties from the defendants for the breach of sec. 193 of the Ontario Act.

History and review of the legislation and decided cases.

ACTION to recover \$1,200 penalties from the defendants for running their cars on three Sundays, contrary to the provisions of the Ontario Railway Act, 1906.

June 4. The action was tried by BOYD, C., without a jury, at Toronto.

J. A. Paterson, K.C., for the plaintiff.

M. Cowan, K.C., and J. B. Holden, for the defendants.

June 25. *Boyd, C.*:—The simple question here is, whether the defendants are liable to pay penalties for running their cars on Sunday. The answer is far from simple, and involves difficulties in the application of constitutional law not covered by previous authority. It appears necessary to take a somewhat general survey of the whole field of pertinent legislation, Imperial, Canadian, and Provincial.

But first as to the legal status of the defendants, a body incorporated on the 17th March, 1910. On the ground, the line of track of the defendants extends over an area of some sixteen miles, from London to Port Stanley, on Lake Erie. Power is given by the charter to establish a line of lake steamers and so communicate with the State of Ohio at Cleveland. Power is also given to construct various ramifications all near-by the present line and all within the Province of Ontario. The railway is at present nothing more than an electric road within the Province. Its possibly larger operation in the future over other Provinces or over the Great Lakes is a matter of contingency that does not affect the present situation. Nevertheless, by reason of presenting, in its application for incorporation, this extended character as in contemplation, it became a subject for incorporation by Dominion charter, and so was passed the statute 9 & 10 Edw. VII. ch. 120, wherein the undertaking was declared to be a work for the general advantage of Canada, and the company was empowered to hold, maintain, and operate the railway subject to the provisions of the Railway Act of Canada (R.S.C. 1906, ch. 37). That statute does not, nor does the private Act, prohibit the running of cars on Sunday. The running in this case took place on the 11th, 18th, and 25th days of December, 1910. It is proved that on one of these days His Majesty's mail was carried, by special request, from London to Port Dover, in addition to the usual carriage of passengers and their belongings.

There has been a long-standing attempt in this Province to enforce cessation of labour on local railways during Sunday, and many efforts have been made to place the law in this respect upon a plain and intelligible footing. This is a most desirable result in regard to all penal or criminal laws, which should be made simple and clear for all men. What has been attempted and decided will now be related as briefly as possible.

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In March, 1897, it was decided by the Court of Appeal that a company incorporated for the purpose of operating street cars by electricity was not an inhibited "person," within the meaning of the provisions of the Lord's Day Act then in force, R.S.O. 1887, ch. 203: *Attorney-General v. Hamilton Street R.W. Co.* (1897), 24 A.R. 170.

The Legislature forthwith proceeded to remedy this by passing a new "Act to prevent the Profanation of the Lord's Day" (R.S.O. 1897, ch. 246). This was of larger scope than the one of 1887 passed upon by the Court, and by secs. 7 and 8 expressly provides for the prohibition of Sunday excursions by railway, and forbids generally (with exceptions not now relevant) the operating of electric street railway cars on the Lord's Day.

In 1901, a broader legal question was raised as to the power of the Provincial Legislature to enact ch. 246. The whole Act was brought before the Court of Appeal for Ontario upon questions submitted by the Lieutenant-Governor in Council. The first question was as to the validity of the whole Act, and in particular as to secs. 1, 7, and 8, and it was answered by a majority of the Court, and the answer affirmed the validity of the statute. Two subsidiary questions were also submitted: (1) as to the power of the Province to prohibit Sunday work on railways subject to the exclusive legislative authority of the Dominion; and (2) as to the like powers in the case of railways declared to be for the general advantage of Canada. These latter questions were answered negating such power in the Province: *Re Lord's Day Act of Ontario* (1902), 1 O.W.R. 312. An appeal was then taken to the Privy Council, and that tribunal reversed the opinion of the majority of the Judges below on the first question, and it was decided that the Act as a whole was *ultra vires*, for substantially the same reasons as those given by Armour, C.J.O., the dissentient Judge. Their Lordships held that the Act, "treated as a whole," was one dealing with a subject falling under the classification of "criminal law," which, by the distribution of powers in the British North America Act, 1867, sec. 91, sub-sec. 27, was reserved for the exclusive legislative authority of the Parliament of Canada: *Attorney-General for Ontario v. Hamilton Street R.W. Co.*, [1903] A.C. 524. Their Lordships held that this answer to the first question rendered it unnecessary to answer the second (as above



set forth), thus in effect, as I understand, affirming the view expressed by all the Ontario Judges in appeal, that the clauses as to the operation of the Dominion railways were not within the competence of the Provincial Legislature.

Other remaining questions (not now, it would seem, relevant to this litigation) the Lords of the Privy Council declined to entertain, as being of hypothetical character which should be left for decision in concrete cases as and when they might arise.

The next attempt to resolve the broad question was by the Dominion, upon a special case referred by the Governor-General in Council to the Supreme Court of Canada in February, 1905: *In the Matter of the Jurisdiction of a Province to Legislate respecting Abstention from Labour on Sunday* (1905), 35 S.C.R. 581. This case set forth a draft Act embodying legislation contemplated by the Province of Ontario in 1904, and in particular asked for direction as to its competence to prohibit the operation of railways on the Lord's Day in the case of undertakings incorporated by the Province and those incorporated by the Dominion, and also as to those incorporated by the Dominion which were declared to be for the general advantage of Canada, but authorised to operate within one Province only (to wit, Ontario), and whose operations were confined to such Province. The majority of the Judges (as it were under protest and without prejudice) indicated their opinion to be that all such interferences making for the compulsory observance of the Lord's Day were beyond the proper competence of the Province and fell within the views expressed by the Privy Council in 1903 as being of criminal character and so within the ambit of the Dominion Parliament.

Pending the launching and the decision of this special case, the Dominion had been legislating, and we find the Canada Railway Act, 1903, being amended by the statute of 4 Edw. VII. ch. 32 (passed on the 10th August, 1904), in which first appear the important clauses upon the force and effect of which the present litigation is mainly to be determined. One provision relates to every railway (electric and other) wholly situate within one Province of Canada, but in its entirety or in part declared to be a work for the general advantage of Canada, and enacts that it shall, notwithstanding such declaration, be subject to any Act of the Legislature of the Province in which it is situated, prohibiting

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or regulating work, etc., upon the first day of the week—which is in force at the time of passing the Act (sec. 2, adding sec. 6a to the Act of 1903). And by sub-sec. 2 it is enacted that “the Governor in Council may at any time and from time to time by proclamation confirm, for the purposes of this section, any Act of the Legislature of any Province passed after the passing of this Act” (*i.e.*, 10th August, 1904), “for the prohibition or regulation of work, business or labour upon the first day of the week, commonly called Sunday; and from and after the date of any such proclamation the Act thereby confirmed, in so far as it is in other respects within the powers of the Legislature, shall for the purposes of this section be confirmed and ratified and made as valid and effectual as if it had been enacted by the Parliament of Canada; and, notwithstanding anything in this Act” (*i.e.*, the Railway Act) “or in any other Act, every railway, steam or electric street railway, and tramway, wholly situate within such Province, but declared by the Parliament of Canada to be, in its entirety or in part, a work for the general advantage of Canada . . . shall thereafter, notwithstanding such declaration, be subject to the Act so confirmed, in so far as that Act is otherwise *intra vires* of the Legislature.”

This first appears as an amendment to the Railway Act, and is carried into the revision of 1906, where it now stands as sec. 9, with some few immaterial verbal variations: R.S.C. 1906, ch. 37, “An Act respecting Railways.”

This large committal of powers to the Provincial Legislature in respect of local railways was subject to some exceptions: the section was not to “apply to any railway or part of a railway,—(a) which forms part of a continuous route or system operated between two or more Provinces, or between any Province and a foreign country, so as to interfere with or affect through traffic thereon;—or, (b) between any of the ports on the Great Lakes and such continuing route or system, so as to interfere with or effect through traffic thereon;—or, (c) which the Governor in Council by proclamation declares to be exempt from the provisions of the section” (sec. 9, sub-sec. 5).

In the year 1906, being that of the last revision of the Dominion statutes, the Province passed “The Ontario Railway Act, 1906,” 6 Edw. VII. ch. 30, assented to on the 14th May, in which pro-

visions are to be found respecting and under the heading of "Sunday Cars." Section 193 (1) declares that no company operating a street railway, tramway, or electric railway, shall operate the same or employ any person thereon on the first day of the week, commonly called Sunday, except for the purpose of keeping the track clear of snow or ice, or for the purpose of doing other work of necessity. With certain exceptions (not now relevant) the section is to apply to all railways operated by electricity, whether on a highway or a right of way owned by the company (sub-sec. 6).

The proclamation of the Governor-General in Council confirming sec. 193 of the Ontario Railway Act (just set forth) was duly promulgated on the 8th December, 1906.

The defendant company came into existence on the 17th March, 1910, by Dominion Act 9 & 10 Edw. VII. ch. 120, under this condition of prior legislation (Federal and Provincial). Nothing has been done, as I have said, by the company, in the way of lake navigation in connection with their line.

No proof was given of any such facts as would indicate that this local road forms part of a continuous route or system carrying through traffic, within the meaning of these words as used in railway legislation. The cases shew that there must be a direct physical connection between the local road and the other through road of which it is to form part, and that proper facilities by way of sidings and accommodations for the transfer of traffic must exist, and these generally should be sanctioned by the proper authorities (in this case the Board of Railway Commissioners) before the particular road can form part of a "continuous route or system:" *Hammans v. Great Western R.W. Co.* (1883), 4 Ry. & Canal Traffic Cas. 181, and *Great Central R.W.Co. v. Lancashire and Yorkshire R.W. Co.* (1908), 13 Ry. & Canal Traffic Cas. 266. To the same effect is American Railway law: *Black v. Delaware and Raritan Canal Co.* (1871), 22 N.J. Eq. 130, 402.

I find as facts that the road has always been strictly a local concern, with no such connection as would constitute it part of "a continuous route or system," and that the traffic of the company was in no sense "through traffic," within the meaning of the Dominion Railway Act, R.S.C. 1906, ch. 37, sec. 9. So that the road, as operated at the time of the alleged offences, was not

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within any of the exceptions expressed in such section of the Dominion Railway Act. Wherefore, the net result is, that the defendant company, though it be an undertaking which has been declared to be for the public benefit of Canada, is yet, by virtue of the Canada Railway Act and the proclamation of December, 1906, subject to sec. 193 of the Ontario Railway Act, which prohibits the operation of electric railway cars on the first day of the week, commonly called Sunday.

The way is now cleared to consider the constitutional aspect of the controversy.

The Parliament of Canada, by the agency of the Governor-General in Council, undertakes to confirm any Act of the Ontario Legislature within the legislative authority of the Province, in so far as the Act prohibits or regulates work, business, or labour upon the first day of the week on any electric railway wholly situate within the Province and which has been declared by the Parliament of Canada to be a work for the general advantage of Canada.

In the present case, the Parliament of Canada has, through the agency of the executive proclamation, ratified and confirmed sec. 193 of the Ontario Railway Act, and made it as valid and effectual as if it had been enacted by the Parliament of Canada: R.S.C. 1906, ch. 37, sec. 9 (3). So far as express language can effect anything, this defendant company has been made subject to the said section 193, in so far as it has been so confirmed (*ib.*, sub-sec. 4).

All that remains, as I regard the case, is to consider whether what has been done by this conjoint legislation is within the scope and power of the respective Legislatures under the Imperial Constitutional Act so as to justify this Court in exacting the penalties claimed.

The defendants' road is territorially within the Province, and is, as operated, strictly a local work respecting which Ontario might properly legislate. But authority to legislate in respect of this road by the Province has been superseded by the intervention of the Dominion, because of its being regarded as a work for the general advantage of Canada: see B.N.A. Act, sec. 92 (10). The Constitutional Act there confers exclusive legislative authority as to this road on the Dominion (sec. 91 (29)). But the Do-



minion is invested with authority to make laws for the peace, order, and good government of Canada in all matters not assigned exclusively to the Provinces: and this means, I take it, the exercise of large and liberal discretionary powers to be exercised for the well being of the community and for the right working of the constitution (sec. 91 and *Riel v. The Queen* (1885), 10 App. Cas. 675, at p. 678, *per* Lord Halsbury.

The authority of the Dominion extends to such works as, though wholly situate within the Province, are, before or after their execution, declared to be for the general advantage of Canada. Here the declaration was made before the execution and in anticipation of what was to be done. Suppose no steps to be taken as to the navigation of the lake by the company or in establishing part of a continuous route or system, it would be competent for the Dominion to nullify the declaration and to subject the company to provincial legislation. I see no good reason why the Dominion should not suspend the affect of this declaration, either directly or indirectly, for sufficient cause, so as to restore (as it were) the power of legislation to the Province in regard to the particular company. Legislative authority exists in the Province as to all local works and undertakings, though it may be superseded by the paramount power of the Dominion in suitable cases. But the Dominion may still utilise the Province as one of the agencies of government, by inviting it to intervene with legislation considered desirable, and not contrary to any controlling enactments passed by the Dominion Parliament. This may be regarded as supplementary legislation of which the Dominion is willing to avail itself or of which the Dominion is willing that the Province should avail itself. The consideration in these cases is not grounded on the doctrine of *ultra vires*, but rather as to what is permissible reciprocally to a superior and a subordinate Legislature in regard to subjects on which each has some right to make laws. The case in hand illustrates this position. We have to deal with two law-making bodies acting with plenary and exclusive powers within the ambit of subjects distributed to them by the Constitutional Act, and yet with some class of rights in which the exercise of power by one may infringe on the exercise of power by the other. The Court is not to deal with a legislative enactment as with a by-law. The Legislature or Parliament is not

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called on to shew cause or give reasons why a certain law has been passed. The policy of the Dominion dealing with long lines of railway through the Provinces and to foreign lands is against any breaking of carriage for any period of time, and insists on a continuous transit, and Parliament, therefore, places no restriction on the running of railways on every day in the week. The policy of Ontario appears to be in favour of a restricted use of the railways subject to provincial control on the first day of the week. If one assumes that, after the many attempts to get judicial guidance to assist in formulating valid and efficient laws on the subject of Lord's Day observance, the law-makers came to the conclusion that no satisfactory statute could be framed on this head which would answer the demands and the requirements of the various Provinces of the Dominion: *e.g.*, that what would satisfy a new western community might not harmonise with the views of the oldest centres of population—that what might satisfy Quebec would not satisfy Manitoba—and so on; this conclusion of inability might serve to explain why we have the present complexity of legislation, bringing into exercise apparently the ingenuity of the legal profession and the reserved resources of the constitution to find out some suitable and effective outcome. One is not to assume that legislation is futile; rather to seek to give effect to it, if possible.

The Parliament on this point as to railways means to leave it to each Province to determine what shall be done with Sunday, or rather what shall be done on Sunday. What I have sought to express has been considered also, I find, by Mr. Justice Barker in *Ex p. Green* (1900), 35 N.B.R. 137, at p. 147. He says: "I am disposed to think that the Dominion Parliament, in designedly refraining from legislating on this subject, did so because it was one which did not concern the general public or affect them all to the same extent or apply to them all in the same degree; but was rather to be regarded and dealt with as a police regulation, local in its character and in its application, which required to be moulded so as to suit the requirements and meet the conditions of different localities and different classes of population, and in that way ensure a reasonable cessation from labour and worldly business on Sunday." See *The Queen v. Halifax Electric Tramway Co.* (1898), 30 N.S.R. 469.

Apart from the religious observance of the day, which cannot be enforced by law, the legislators must have recognised the value of a recurring period of rest in railway life, more than ever needed in modern stress and competition. The political value of a rest-day is put thus by Macaulay: "During this cessation of labour a process is going on quite as important to the wealth of the nation as any process which is performed on more busy days. Man, the machine of machines, is repairing and winding up so that he returns to his labour on Monday with clearer intellect, with livelier spirits, with renewed corporeal vigour." However the day of rest may be used or abused, the legislators may well consider the policy a wholesome one in so far as corporations are concerned over which they have creative and regulative power.

It seems to me possible as well as proper so to fit together these enactments as to induce harmonious and efficient action between the two Governments, Federal and Provincial, in order to the attainment of an end which both have had in view. One may wonder why the Sunday labour question was not dealt with directly and immediately by the Parliament of Canada. But, whatever the reason be, it is for the Court to explain and as far as possible to render effective the joint legislation (suggestive on the one hand and responsive on the other), so that by co-operation the desired end may be reached of securing one day of periodical rest.

The scheme of this twofold legislation is not to be regarded as a delegation of legislative power in a matter of criminal law to a body having no capacity to legislate criminally, but rather the designation by the Dominion of a legislative agency to decide whether it is expedient to enact a law for the regulation of the Lord's Day in its secular aspect, as to railways entirely within the Province, and a legislative report being made by an appropriate enactment, then to give full legal force and efficacy to such provincial action by accepting it and assuming responsibility for it as if it were a Dominion statute. The statute of the Province indicates the policy acceptable to the Province, and the Dominion says "be it so." In this regard, the legislative power of the Province is no longer overridden by the Dominion, but is recognised as a power properly exercised. It appears to me that the Domin-

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ion may relax its hold on any internal provincial railway and lay it open in a defined degree to be regulated or controlled by the local Legislature.

As I read the opinion given upon the special case in 35 S.C.R., the Court intimates that a Province has no power to restrict the operation of companies of their own creation to six days in each week because that restriction seems to be within the views expressed in the Privy Council and to be regarded as a matter of criminal law, *ultra vires* of the Province. See pp. 582 and 592, in answer to question 5.

This point, in this limited way, as to purely provincial corporations, was not before the Lords of the Privy Council, and their guarded deliverance would rather imply that this was one of the questions not passed upon. However, with all proper deference to the Judges of the Supreme Court, I cannot regard the opinion expressed on this head as a judgment binding on me, nor can I accept it as the law. I fail to see why the Province may not legally and validly incorporate a railway company in Ontario as a local undertaking with power to operate only on six days of the week. A refusal to allow work on the Sunday would not in this connection savour of the criminal law, but would be a supposed or an accepted salutary rule of conduct imposed for the benefit of the workmen and the better working of the road itself. If the company accept such a charter with such a limitation, wherein is the Constitutional Act offended against? The legislative working of the whole constitution in these cases of apparent conflict or discrepancy is to be accommodated or adjusted by the expedient worked out in the *Hodge* case and others in the same direction: *Hodge v. The Queen* (1883), 9 App. Cas. 117; *Fielding v. Thomas*, [1896] A.C. 600, 611; *Grand Trunk R.W. Co. v. Attorney-General of Canada*, [1907] A.C. 65, 68. The aspect of the law takes colour from its surroundings, *i.e.*, the nature of the legislation and the object aimed at. Here is no general criminal intent, but the incorporation of a local concern, over which the Province has plenary power of legislation, covering all things and conditions considered expedient and desirable by the incorporating power.

After the disposal of the special case in the Supreme Court, the Province of Ontario passed their railway law, which by its enactments imposes this limitation upon electric railways, 6 Edw.



VII. ch. 30, sec. 193, and that has not been questioned as being *ultra vires*. The power to legislate as to the Lord's Day by the provincial law-makers, as to railways subject to their legislative authority, is recognised in the Dominion Lord's Day Act, R.S.C. 1906, ch. 153, sec. 3 (2).

Briefly to sum up the results. It is not to be overlooked that the defendants in this case take the Dominion charter subject to the state of existing legislation. It is taken, therefore, with knowledge that the Dominion had permitted the Province to legislate as to Sunday work on local railways (despite the declaration as to the undertaking being for the public advantage of Canada), and that the Province had legislated to the effect that for six days only should the road be worked for profit, and that the executive of the Dominion, under sanction of the Parliament of the Dominion, had approved and confirmed this provincial law. How then can the defendants defend this action on the ground that the charter was not taken on this footing? Can the company be allowed thus to "approbate and reprobate"? Can the privileges of the charter be enjoyed and the conditions be repudiated?

I may add a few words as to laws having more than one aspect. Marshall, C.J., said in *Gibbons v. Ogden* (1824), 9 Wheat. 1, 204, that "all experience shews that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical."

Besides the constitutional cases already referred to, the point has arisen in the consideration of municipal and other by-laws.

In *Calder and Hebble Navigation Co. v. Pilling* (1845), 14 M. & W. 76, a by-law that a canal was not to be used on Sundays was held invalid because not warranted by the general power of a local statute to make by-laws for the good government of the company and for the good and orderly using of the navigation and the work—governing of the bargemen, etc. The by-law was held to be one relating to matters which ought to be left to the general laws of the land as to the observance of Sunday. Rolfe, B., said that under peculiar circumstances the by-law might be upheld; as if, for instance, the company were to come to the conclusion that, in order to secure a due supply of water in the canal, it was necessary to have no navigation on it during one day out of seven

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in order to make navigation good during the other six, and then Sunday might be taken as the fittest day to close the canal: p. 90. In other words, though the by-law would be bad if made for merely moral purposes, *pro salute animarum*, it might be upheld if susceptible of another construction, and if regarded in a different aspect, bringing it within the competence of the corporation or law-making body.

Another illustration of this double aspect in a by-law, as to whether it deals with the morals of the community rather than with the good rule and government of the locality, may be found in *Thomas v. Sutters*, [1900] 1 Ch. 10, 15. In that case *Calder and Hebble Navigation Co. v. Pilling* is discussed, and it is pointed out that, while a navigation company may have no legal concern about the behaviour or morals of those who use it, the power of a municipality dealing with the good order of their streets goes far beyond that: pp. 16, 17. So there is a further advance in power and responsibility when the field of action is laid open to a legislative body such as one of the Provinces of the Dominion. In this last case every intendment will be made to support the legislation, and it is not the business of the Courts to pass upon the wisdom or reasonableness of the enactment, but simply to say whether it is fairly within the area of its constitutional powers.

By the legislation of the Dominion it has been left to the Province to say whether any condition shall be imposed upon local electric railways in regard to the working of the road on Sundays. And the response made by the Province is, that it is fitting that there should be one day of rest in seven, and that Sunday is the fittest day for that purpose. Good reasons may easily be found for such a policy, having regard to Sunday as a secular institution; public economy requires for sanitary reasons a periodical day of rest from labour, and this salutary rule may rightly and legally be imposed upon corporations which owe their existence to the provincial power which so legislates and creates. This is not, therefore, a general law extending to the public at large—to all classes and conditions of men—but to a corporate body over which the local Legislature has, inherently or by delegation from the Dominion, legislative plenary power as to its conduct, governance, and operation.

The late decision of the Supreme Court on Sunday law in

*Ouimet v. Bazin* (1912), 48 C.L.J. 439, is not in point for the present case. It is distinguishable both because it purports to be a general law framed for all persons, and because the case did not involve the question of local corporations over which the Province has constitutional power and competence.

The legislation is not to be regarded as a section of the criminal law of Canada, but as a particular penal law intended for the regulation of local electric railways within the Province.

So viewed, I would uphold the impeached legislation as *intra vires*, and would award to the plaintiff the penalties claimed.

There should be no exemption as to the day on which the mail was carried. The cars were not run for the purpose of carrying the mail, but the mail was carried as a favour because the cars ran that Sunday.

Costs to the plaintiff.

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*Infant—Custody—Habeas Corpus—Right of Father against Maternal Grandparents—Agreement—Adoption—1 Geo. V. ch. 35, sec. 3—Application to Father of Child—Conduct of Father.*

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*Held*, reversing the decision of BOYD, C., *ante* 113, that the statute 1 Geo. V. ch. 35, sec. 3, did not apply to this case, in which a father was asserting his right to the custody of his infant child; that the father was not bound by, but was at liberty to revoke or ignore, the agreement which he had made with the maternal grandparents under which they claimed the right to the custody of the child; and that no misconduct on the part of the father such as would induce the Court to take the custody of his child from him, had been shewn.

Review of the authorities.

APPEAL by W. H. Hutchinson, the father of Adah May Hutchinson, a child of two years, from the order of BOYD, C., *ante* 113, upon the return of a *habeas corpus*, refusing to order the child to be delivered to the appellant, by the child's maternal grandparents, the respondents.

May 27. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

W. N. Tilley, for the appellant, argued that the agreement was invalid, as parents could not enter into an agreement legally binding to deprive themselves of the custody and control of

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their children; and, if they should do so, they could at their option repudiate it: *Fidelity Trust Co. v. Buchner* (1912), *ante* 367; *Humphrys v. Polak*, [1901] 2 K.B. 385, at p. 388; *Re Davis* (1909), 18 O.L.R. 384. The evidence shewed that the interests of the child would be best served by leaving her with her father, whose character had been unsuccessfully assailed. The appeal should succeed despite the provisions of 1 Geo. V. ch. 35, sec. 3.

V. A. Sinclair, for the respondents, contended that the father was bound by the agreement. He had abandoned the child. The onus was upon him to shew that the interests of the child demanded that it should be returned to him. This he had; failed to do; on the contrary, the evidence shewed that it would be better for the child to remain with the grandparents. And the welfare of the child was always the guiding principle for the Court. He referred to *Roberts v. Hall* (1881), 1 O.R. 388, at pp. 404, 405; *Chisholm v. Chisholm* (1908), 40 S.C.R. 115; *Re Ferguson* (1881), 8 P.R. 556; Eversley on Domestic Relations, 3rd ed., pp. 513, 519, 522; *The Queen v. Gyngall*, [1893] 2 Q.B. 232; *The Queen v. Barnardo* (1889), 23 Q.B.D. 305; *Re Argles* (1907), 10 O.W.R. 801; *Re Longaker* (1908), 12 O.W.R. 1193; *Re Keys* (1908), 12 O.W.R. 160; Am. & Eng. Encyc. of Law, 2nd ed., vol. 21, p. 1037. He also relied upon 1 Geo. V. ch. 35, sec. 3.

Tilley, in reply. The father has never abandoned the child. The parental right of control is supreme, and the father had never voluntarily relinquished this even for a day. He referred to *Re Faulds* (1906), 12 O.L.R. 245.

June 25. RIDDELL, J.:—William H. Hutchinson some years ago married Mary Pearl Burvill, the seventeen-year-old daughter of Robert Burvill and his wife, Adah J. Burvill. The young couple lived most of the time with the parents of the wife: their only child, Adah May Hutchinson, was born in that home, in August, 1909, and the grandparents, without opposition on the part of the father at least, took charge of the infant to a great extent. The young mother got sick, and in December, 1911, was lying dangerously ill—at the point of death indeed. The grandparents were and are exceedingly fond of the child; and, in order to have possession of her, Burvill had a document drawn



up by his present solicitor. He says that he told Hutchinson "it was to make the said infant . . . our child and heir if anything should happen to her mother, and that she would get our property, and if nothing did happen to his wife the paper would be no good"—"told him that it was to make her our child and heir so that he knew perfectly its purport" (affidavit of the 26th February, paragraph 7). Mrs. Burvill swears that what her husband said to Hutchinson was "that the . . . agreement was in the interest of the said Adah May Hutchinson and would make her our child and full heir" (affidavit of the 24th February, paragraph 12). The witness to the document, Adda Moore, says that Mrs. Burvill told her "that it was to make the child their heir" (affidavit of the 26th February, paragraph 5). Hutchinson says: "What he told me was that if anything happened to him, as he had no children of his own, my wife's cousins and other relations would claim his property and would take their share, and stated that the object of the paper was to prevent this—he never intimated to me that I was signing away my right to the custody of the said child" (affidavit of the 21st March, paragraph 13).

On Monday the 4th December, 1911, the document was signed, sealed, and delivered by Hutchinson, Burvill and Mrs. Burvill. It is an indenture between Hutchinson, of the first part, and Burvill and his wife, of the second part. After reciting that Hutchinson was the father of the child Adah May Hutchinson, born on the 16th August, 1909, that she had largely resided with her grandparents, that "Mary Pearl Hutchinson is now seriously ill and may not recover, and it has been agreed that in the event of her death that (*sic*) the said grandparents shall assume the care and maintenance of the said child and take over the custody of the same and the said father has agreed thereto," the indenture proceeds: "Now this indenture witnesseth that, in consideration of the premises and the sum of one dollar paid by the parties of the second part to the said father, the said father hereby grants and assigns to the said parties of the second part all his rights to the possession, custody, control, and care of the said infant child Adah May Hutchinson, and all the right and advantage to be derived from the custody and possession of the said child, until she attains her majority or marries under

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that age. And the said father hereby appoints the said parties of the second part to be the guardians of the personal estate of the said infant Adah May Hutchinson until she shall attain the age of twenty-one years or marries, and doth hereby covenant and agree not to revoke this appointment or appoint any other person to be the guardian of said child, and the said parties of the second part hereby adopt the said child and covenant and agree with the said party of the first part that until such time as the said child attains the age of twenty-one years or marries they will maintain, lodge, clothe, and educate the said child in the manner suitable to the position of the said parties of the second part, to the same extent and in the same manner as if the said Adah May Hutchinson was their own lawful child, and will at their own expense provide the said child with all necessities, and will pay and discharge all debts and liabilities which the said child may incur for necessities, and will indemnify the said party of the first part against all actions, claims, and demands in respect thereof. And the said parties of the second part further agree that the party of the first part shall have access to the said child at all reasonable times, and the father on his part covenants that he will not try to use such visits for the purpose of influencing the said child to leave the said grandparents. And it is further covenanted and agreed that he will not, nor shall any person claiming under him, interfere in any way with the rights of the said parties of the second part in the control and custody of the said child."

On the evening of Tuesday the 5th December, as Hutchinson says, he asked to see the document, and, when he saw the contents, he at once told Burvill that he never had intended to sign such a document, and asked to have the document cancelled. This is not assented to by Burvill; but all parties agree that Hutchinson and his brother Clarence Hutchinson went to Burvill within a very short time (it is sworn by Clarence to have been on Thursday the 7th December), and wanted Burvill to destroy the paper.

The affidavits are conflicting as to whether the dying woman also desired the document to be cancelled; but there is no doubt that Burvill and his wife ultimately refused, and insisted on their rights thereunder: they "refused and always have refused

to have this destroyed and claimed they were still in full force," says Mrs. Burvill (affidavit of the 24th February, paragraph 14); "refused to cancel the same," says Burvill (affidavit of the 26th February, paragraph 9).

On the 18th January, 1912, the father tried to take the child away, but the grandparents prevented it by force. Hutchinson then issued a writ to have the document set aside; but, being advised by counsel that the document did not require to be set aside, he sued out a writ of *habeas corpus*; on the return, the Chancellor refused to order the child into the custody of her father (*ante* 113); and the father now appeals.

The judgment in the Court below proceeds upon two grounds of different character.

First, upon the instrument, the learned Chancellor says: "I must regard this at present as a valid agreement, which is binding on the father." "The signed and sealed agreement of the 4th December, while it stands, appears to be a bar to any such application as the present; and it is valid in law under the statutory provisions in 1 Geo. V. ch. 35, sec. 3, taken from the revised statute in force when the deed was executed."

In *Fidelity Trust Co. v. Buchner*, *ante* 367, I had occasion, in deciding as to adoption, to consider the effect of this statute; and I refer to that case for most of the authorities which led me to the view that the statute has no application to such a case as the present.

I add Halsbury's Laws of England, vol. 17, p. 123, sec. 287, where, citing 12 Car. II. ch. 24, sec. 8, and 49 & 50 Vict. (Imp.) ch. 27, secs. 3, 4, it is said: "Both a father and mother have power, if under age by deed, and if of full age by deed or will, to appoint persons to act as guardians of an infant child, in the case of a father, *after his death*. . . . Where the appointment is made by deed, it is of a testamentary nature, and is revocable by a subsequent will making a different appointment. . . ."

In *Lord Westmeath's Case* (1819), Jacob 251, note (c), Lord Westmeath had, by indenture of the 17th December, 1817 (see Jacob, p. 127), covenanted to permit his "daughter and such other child or children as they might have between them, to be and reside with their mother [the defendant], and to be educated under her care and superintendence. . . ." One could

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not find any case more within the words of the Act if the provisions of the Act were intended to be applicable, the father living: this was "to dispose of the custody and education;" but Lord Eldon, upon an application by way of *habeas corpus*, nevertheless ordered "Lady Rosa Nugent, aged five years, and Lord Delvin, aged seven months," to be delivered to their father (Jacob 251, note (c)).

In Macpherson on Infants, p. 83, it is said: "Such a deed" (*i.e.*, a deed under 12 Car. II. ch. 24, sec. 8) "certainly resembles a will in some respects; for it has no operation during life, and is revocable at pleasure." *Cf.* Schouler, sec. 287.

Holding then, as I do, that the statute does not apply to the present case, it is necessary to consider whether, outside the statute, this document has any validity to bind the father.

The law is nowhere better expressed than in the judgment of the Chancellor in *Roberts v. Hall* (1882), 1 O.R. 388, at p. 404: "The general rule is indisputable, that any agreement by which a father relinquishes the custody of his child, and renounces the rights and duties which, as a parent, the law casts upon him, is illegal and contrary to public policy." And at p. 406: "The father could have interfered at any moment and put an end to the arrangement if he found that it was being carried out disadvantageously to the child."

In *Regina v. Smith* (1853), 17 Jur. 24, a father had in May, 1852, entered into a written agreement, reciting that his wife, being dangerously ill, had, with his consent, requested E. Smith, her brother, to take charge of, educate, and bring up her infant daughter, born June, 1847, which E. Smith had agreed to do, on condition that the infant should remain with him until she was grown up and able to provide for herself. The document then proceeded with an agreement on the father's part to permit the infant to reside with E. Smith till she should be grown up, etc., and that he "would not in any way interfere with the said E. Smith in the bringing up and education of his said daughter, nor remove nor seek to remove her from the care of the said E. Smith, but would at all times permit her to remain with him as his adopted child;" and he agreed to pay E. Smith 14s. per month for her support and education. The mother died in July, 1852. In January, 1853, a writ of *habeas corpus* having been



taken out by the father, Erle, J., apparently with much reluctance, held: "The father is at liberty to revoke the consent, and is therefore entitled to the custody of the child:." *S.C.*, 22 L.J. N.S.Q.B. 116, 16 Eng. L. & Eq. 221.

I adhere to the decision in *Re Davis* (1909), 18 O.L.R. 384: "Parents cannot enter into an agreement legally binding to deprive themselves of the custody and control of their children; and, if they elect to do so, can at any moment resume their control over them."

*Humphrys v. Polak*, [1901] 2 K.B. 385, is also in point. "What," says Stirling, L.J., at p. 390, "is the bargain in this case. . . . ? It is in substance that the child is to remain in the possession of the defendants for the purpose of enabling the defendants to treat the child as their own and relieve the mother of all responsibility in connection with the bringing up of the child; in other words, the defendants were to undertake the duties which the law imposes on the mother, and to have the rights which the law gives her in relation to the child. In my opinion, the law does not permit such a transfer of the mother's rights and liabilities." See also *Lord St. John v. Lady St. John* (1805), 11 Ves. 526, 531; *Hope v. Hope* (1857), 8 De G. M. & G. 731; *In re O'Hara*, [1900] 2 I.R. 232, at p. 241: "English law does not recognise the power of bindingly abdicating either parental right or parental duty:" *per* FitzGibbon, L.J.

*Roberts v. Hall*, 1 O.R. 388, has been cited as against this doctrine; but all that case actually decides is, that, even though one party to a contract could not be compelled to carry out his part, if he does in fact carry out his part, the other party is bound to carry out his. We need not consider whether this would be held to be law since the case in the Supreme Court of *Chisholm v. Chisholm* (1908), 40 S.C.R. 115. This case seems to me to be against the respondent rather than for him. The plaintiff, being left a widow with one daughter, agreed with her father-in-law that he should become guardian to the child, educate her in a convent, and then provide for her, the plaintiff to have an allowance of \$500 per annum. The Chief Justice and Davies and MacLennan, JJ., considered that the appointment of the defendant as guardian was authorised by the Nova Scotia law; that that was a sufficient consideration. The latter two learned

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Judges held that there was no surrender of the natural duties of mother to child "beyond those involved in the transference to the grandfather of the legal guardianship under the Nova Scotia statute" (p. 122). These learned Judges held the contract to pay the \$500 *per annum* valid. But Idington, J., held that no power existed to make the defendant guardian, and that the only consideration was the surrender of the child, and this is "either no consideration or an illegal consideration" (p. 125). Duff, J. (p. 127): "The defendant's promise . . . resting upon the consideration of her undertakings respecting the education and guardianship of her child and upon that consideration alone, is such a promise as, under our law, the Courts cannot enforce." The learned Judge assumed that the Nova Scotia law permitted the appointment of the defendant as guardian (p. 126).

The document not being a bar, there is no need to have it set aside—it is not, perhaps, wholly without significance that there is no provision in it that the grandchild shall be the "heir" of her grandparents.

The document, although it is not a bar to these proceedings, is not wholly to be disregarded in the consideration of the second branch of the case.

Upon an application to the Court for the custody of a child, it is not altogether, or even primarily, the parental right of the father which the Court, acting for the King as *parens patriæ*, takes into consideration, but the advantage—I use the larger word—of the child. The law gives the custody and control of his children to the father, not for his gratification, but on account of his duties; and, if he seems to have been oblivious of these duties, the Court may well decline to deliver his children over to him. An agreement that another may have such custody and control may indicate a want of sense of such duty—or it may not—according to circumstances; but it is wholly right that the fact that such an agreement has been made should be taken into consideration.

A long acquiescence in another having such custody and control may indicate disregard of parental duty—and, what is equally important, may permit a child to become accustomed to an environment from which he should not be torn. Nothing of the kind appears here: even assuming that the father wholly

understood the document when he signed it, there was a prompt repudiation—and there was no becoming habituated to a novel situation, subsequent to and authorised by the agreement. In my opinion, then, the agreement is of little significance, if any.

There is no doubt as to the law—it is not as at the common law, where “the parent had, as against other persons generally, an absolute right to the custody of the child, unless he or she had forfeited it by certain sorts of misconduct:” *per* Lord Esher, M.R., in *The Queen v. Gyngall*, [1893] 2 Q.B. 232, at p. 239; but as in equity, where “the Court is placed in a position by reason of the prerogative of the Crown to act as supreme parent of children, and must exercise that jurisdiction in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child. The natural parent in a particular case may be affectionate, and may be intending to act for the child’s good, but may be unwise, and may not be doing what a wise, affectionate, and careful parent would do. The Court may say in such a case that, although they can find no misconduct on the part of the parent, they will not permit that to be done with the child which a wise, affectionate, and careful parent would not do. The Court must, of course, be very cautious in regard to the circumstances under which they will interfere with the parental right. . . . It must act judicially in the exercise of its power. . . . In the case of *In re Fynn* (1848), 2 DeG. & S. 457, Knight Bruce, V.-C., said: ‘Before this jurisdiction can be called into action . . . it’ [*i.e.*, the Court] ‘must be satisfied, not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shewn himself to be a person of such a description, or is placed in such a position, as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost, or suspended—should be superseded or interfered with. If the word “essential” is too strong an expression, it is not much too strong.’ That is a clear statement that the Court must exercise this jurisdiction with great care, and can only act when it is shewn that either the conduct of the parent, or the description of person he is, or the position in which he is

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placed, is such as to render it not merely better, but—I will not say ‘essential,’ but—clearly right for the welfare of the child in some very serious and important respect that the parent’s rights should be suspended or superseded.”

In the case of *In re O’Hara*, [1900] 2 I.R. 232, a woman in poor circumstances had entered into an agreement whereby one McMahon, a man of some means, adopted her daughter, about nine years old—the young girl having previously been in an Orphan Society’s Home. About eighteen months after, she demanded her child, and McMahon refused. Upon proceedings on *habeas corpus*, McMahon deposed that he and his wife were both much attached to the child and that the child was very fond of them. There was no difference of religion. Kenny, J., saw the child, and was satisfied that she regarded with the strongest aversion the idea of returning to her mother; and he decided that, having regard to the mother handing over the child under the agreement, and the circumstances and the existing position of the child, she should not, from the point of view of her own welfare, be taken from the custody of McMahon. Upon an appeal being taken by the mother, McMahon lodged an undertaking to maintain and educate the child in a proper manner until she was twenty-one or married with the approval of the Rector, and then to pay her £20, charging his property with the payment. The Court of Appeal (Lord Ashbourne, C., FitzGibbon and Holmes, L.JJ.) unanimously reversed the decision—though McMahon was “a decent, honest man of his class, of a blameless character” (p. 236), “a very respectable man” who had “given his evidence fairly” (p. 237). While the examination of the child by Kenny, J., was approved of, it was considered, “on the other hand, the parent’s *primâ facie* right must also be considered, and the wishes of a child of tender years must not be permitted (to use the words of Lord Campbell) to subvert the whole law of the family, or to prevail against the desire and authority of the parent, unless the welfare of the child cannot otherwise be secured. . . . Misconduct, or unmindfulness of parental duty, or inability to provide for the welfare of the child, must be shewn before the natural right can be displaced. Where a parent is of blameless life, and is able and willing to provide for the child’s material and moral necessities, in the



rank and position to which the child by birth belongs—*i.e.*, the rank and position of the parent—the Court is, in my opinion, judicially bound to act on what is equally a law of nature and of society, and to hold (in the words of Lord Esher) that ‘the best place for a child is with its parent’” (pp. 240, 241). Fitz-Gibbon, L.J. (p. 241), goes on to say: “Of course I do not speak of exceptional cases . . . where special disturbing elements exist, which involve the risk of moral or material injury to the child, such as disturbance of religious convictions or of settled affections, or the endurance of hardship or destitution with a parent, as contrasted with solid advantages elsewhere. The Court, acting as a wise parent, is not bound to sacrifice the child’s welfare to the *fetish* of parental authority, by forcing it from a happy and comfortable home to share the fortunes of a parent, however innocent, who cannot keep a roof over its head, or provide it with the necessities of life.” The whole judgment of the Lord Justice, full as it is of masculine common sense, well repays perusal. Holmes, L.J. (p. 253), says: “The period during which a child has been in the care of the stranger is always an important element in considering what is best for the child’s welfare. If a boy has been brought up from infancy by a person who has won his love and confidence, who is training him to earn his livelihood, and separation from whom would break up all the associations of his life, no Court ought to sanction in his case a change of custody. But I never heard of this principle being acted on where a boy or girl under the age of eleven has spent less than two years with the person who resists the parent’s application. It is one of the advantages of youth that it can adapt itself to altered circumstances with a facility which disappears with advancing years. . . .”

The welfare of a child, in a case like the present, means welfare in its widest sense. Pecuniary benefit is often a very secondary consideration. “Every wise man would say”—I am quoting Lord Esher in *The Queen v. Gyngall*, [1893] 2 Q.B. at p. 243—“that, generally speaking, the best place for a child is with its parent. . . . It cannot be merely because the parent is poor and the person who seeks to have possession of the child is rich, that, without regard to any other consideration, to the natural rights and feelings of the parent, . . .

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the child ought to be taken away from its parent merely because its pecuniary position will be thereby bettered."

I also refer to the admirable judgment (if I may without presumption say so) of Mr. Justice Anglin in *Re Faulds*, 12 O.L.R. 245, in which that learned Judge considers the cases some of which I have quoted from.

There is and can be no pretence that the applicant here is other than of good character—one witness, indeed, says he has heard him swear many times, and Mr. and Mrs. Burvill both say he swore at his wife. This is emphatically denied—but, even so, I should fear for many a father if an occasional oath—however reprehensible, and on that opinions might differ—were to be a reason for depriving him of his children. Some think him crusty and quick-tempered, some do not—that, again, is a matter of degree, and nothing is adduced to shew that he is below the average in morals or manners. Nothing which, by the wildest stretch of the imagination, could be called misconduct is even alleged.

The facts or alleged facts adduced to shew unmindfulness of parental duty are almost absurdly petty. It is said that, all living together in the same house, the baby slept with her grandparents; that the father objected to her sleeping with him; and, "when she required to be nursed or fed or attended to during the night, he never did it, but" the grandfather "looked after the said child and assisted her mother in taking care of the child, while the said father slept; and it was the same during the day, if the child required any attention; the said father would insist on Burvill and wife looking after the baby . . . ; he . . . has refused to take his share of responsibility in connection with the said child and her care, and has left the entire care of the said child to the mother and to Burvill and his wife" (the grandparents), "leaving" Burvill and his wife "to walk up and down with the said child and look after her." As the grandmother says, "he . . . would not get up during the night to look after the baby, and, while she was a baby, my husband would get up and carry her into her mother's room, and would then have to go back again and bring the baby back again to our room, the father refusing to be disturbed, and the said baby has always slept with my said husband and

myself from a week after her birth, and I never knew the father to look after the baby around the house. . . .” The father says that the grandparents “have always wanted to have my said . . . child . . . with them, and I allowed them to do so to please them and to please my wife, who was in delicate health—that, on account of my wife being in delicate health, the child slept but very little with my said wife, and the grandparents . . . always wanted to keep the child with them, and if the child happened to be with myself and wife and awoke in the middle of the night, the said Robert Burvill would invariably come and take the child away; and, if I raised any objection, he was always offended; and, for the purpose of keeping the peace and not annoying my wife, I practically allowed the said Robert Burvill and his wife to have almost the entire custody of the child.”

Even without this explanation, one does not require to be a wizard to understand how matters went on in that house. A couple with one child, a daughter, that one ewe lamb taken very young by an outsider, one and only one grandchild born in their house—what chance had the father, even if he wished to do so, to take any part in the rearing of that baby? Does any grandmother imagine that her son-in-law, or, indeed, even her own daughter, knows anything about bringing up a child? Is the man who snatched from them their only child also to get possession of their only grandchild? And, even if he did not wish his sleep to be broken by a crying infant, it is understood that this is not without precedent in the tenderest and most conscientious of fathers.

Then it is said that he refused to wheel the child in a baby-cart, saying he was no dray-horse and the like. He explains that this was only on one occasion when he intended to drive his wife and child in a buggy. But, suppose he did refuse, hundreds of fathers have done the like without being considered unnatural.

It is quite plain that the grandparents are passionately fond of the child; as the grandmother swears, “we always claimed the said baby and claimed her to be ours because we had brought her up and looked after her;” as another affidavit has it, “the . . . grandparents . . . appeared to be, so far as their

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actions shewed, the parents of the said infant. . . .” They are jealous of the father, as they would be of any one who should seek to interfere with their charge of the child, a wholly natural jealousy; and they magnify trifles, adduce everything, however small, which might help them to hold on to their darling. But, when all is said, there is nothing which shews that the father is unmindful of his parental duties.

Then is there any inability to provide for the welfare of the child? I do not see any. The father is healthy—the attempt to shew or at least to suggest that he is tuberculous, desperate as the attempt was, wholly fails, in view of what his medical man swears. He is respectable, of good habits, industrious and trustworthy. He is steadily employed, and attends to his work continuously, in a tool factory. He intends to take up house and have his sister keep house for him; she is about thirty years of age, and was trained in house-work by her mother, who died about twelve years ago; for some years before that time she had everything to do in the house on account of her mother’s ill-health, and after her mother’s death she brought up her younger brothers; she has at different times acted as nurse and taken special care of children. She swears that she is fond of children, and has been in contact with them a great deal—she has, indeed, for the last six or seven years worked for a cutlery company in New York State, but those who should know her best say that she is a steady, competent, experienced girl, a capable and careful housekeeper, quite able and fit to look after her brother and his child.

It is suggested rather than said that the expectations of the child will be diminished by placing her in the hands of her father. That, I decline to believe. It is not at all probable that grandparents so fond as these undoubtedly are could be unreasonable enough, mean enough, to punish an innocent child for being taken away from them through no fault of her own. But, if it be so, “pecuniary benefit is often a very secondary consideration”—and more so in this new land than in the older countries. We have a different system of society, a different way of looking at life, in Canada from that in England or Ireland. In the case of a boy in a land where every one works except the criminal, the tramp or the helpless cripple, a legacy is generally or at least often



more of a curse than a blessing. It may not be quite the same in the case of a girl; but the possession of a small legacy is by no means of such importance with us as in some countries. In any case, the hope of a legacy from grandparents must in this case be but as the small dust of the balance.

The child must be expected to grieve for a while, but youth is elastic, and she will soon become accustomed to her new surroundings. And, without pretending to more than "common knowledge" on the subject, I venture to think that the future happiness and welfare of the little girl will not suffer from her being intrusted to an aunt of rather decided views, the father remaining near to see that the discipline is not too rigid, rather than being left in charge of doting grandparents, who have no other issue—there is, to say the least, rather less chance of the child being spoiled.

I think the appeal should be allowed without costs here or below; the order not to issue until the father files an affidavit shewing that he has procured a suitable house or rooms for himself and child.

A mass of affidavits has been filed, containing much irrelevant material—the climax of absurdity in that regard is reached by the filing of a petition signed by a number of neighbours, giving their opinions as to the proper custody of the child. This will be taken off the files—the Court does not decide cases according to the wishes or views of neighbours, however respectable; and the solicitor should have known better than to offer such a document. Many allegations are solemnly sworn to which can have no possible bearing upon the case.

I conclude by joining the Chancellor in the wish expressed in the last paragraph of his judgment.

FALCONBRIDGE, C.J.:—I agree in allowing the appeal—no costs here or below.

BRITTON, J.:—After a careful reading of the judgment of the learned Chancellor, and of the cases cited by him, as well as the cases cited upon the argument, I am of opinion that, notwithstanding 1 Geo. V. ch. 35, sec. 3, this appeal should succeed.

The agreement made on the 4th day of December, 1911, between the parties, is not binding upon the appellant. The

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appellant, as father of the infant girl, is entitled to her custody. I quite agree with the Chancellor in this, that the character of the grandparents (respondents) is beyond reproach—and that the interests of the child would very likely be better subserved by leaving her custody to remain *in statu quo*, the father having all reasonable access to the child when he so desires; but, as a matter of law, the father is entitled to revoke or ignore the agreement made by him. Nothing has been shewn as to the character or habits of the father such as would disentitle him to insist upon his strict legal rights.

The appeal will be allowed. In view of the agreement and the perfect good faith of the respondents, there should be no costs of appeal or below. It will be greatly regretted, later on, if some amicable arrangement be not made between the father and grandparents in reference to this child. If the order allowing the appeal must issue, it will be when and on terms mentioned by my brother Riddell.

*Appeal allowed.*

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[DIVISIONAL COURT.]

RE SANDERSON AND SAVILLE.

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*Mines and Minerals—Miner's License—Failure to Renew—Discovery and Staking after Expiry—Invalidity—Mining Act of Ontario, 1908, secs. 22(1), 176(1), 181(1)—“Special Renewal License” under sec. 85(1) (a)—Mining Commissioner—Finding of Fact—Appeal.*

The appellant, the holder of a mining license, being at a distance from the Recorder's office, failed to have his license renewed before the 1st April, 1911; he prospected, notwithstanding, and on the 21st April made a discovery and staked two claims. On the 24th April, his license was renewed under sec. 85(1) (a) of the Mining Act of Ontario, 8 Edw. VII. ch. 21:—*Held*, affirming the decision of the Mining Commissioner, that the appellant could acquire no rights by such a discovery and staking.

*Per RIDDELL, J.*:—Having regard to secs. 22(1), 176(1), and 181(1) of the Act, what the appellant did after his license expired was a crime, and he could found no claim thereon.

*Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147, *McKinnon v. Lundy* (1893-4), 24 O.R. 132, 21 A.R. 560, *Lundy v. Lundy* (1895), 24 S.C.R. 650, specially referred to.

The “special renewal license,” under sec. 85(1) (a), is not operative to make that rightful which was wrongful, that innocent which was a crime, but only to save from forfeiture the interest already rightfully and lawfully acquired of “the holder of a mining claim.”

Upon the evidence, the Court declined to interfere with the finding of the Mining Commissioner in favour of the validity of the respondent's staking.

APPEAL by Simpson Sanderson and John Sanderson from the judgment of the Mining Commissioner, reversing the decision of a Mining Recorder, and declaring that Eliza Saville, the respondent, was entitled to be recorded as the holder of two mining claims in the Sudbury mining division.

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The reasons for judgment of the Mining Commissioner were as follows:—

This is an appeal by Eliza Saville from the decision of the Mining Recorder of the Sudbury mining division, by which he allowed the dispute of Simpson Sanderson, on behalf of John Sanderson, against the mining claim of the appellant, Eliza Saville, cancelling the appellant's claim, and giving the property, or rather the portion of it which was overlapped, to the disputant, under his subsequent staking.

The matter was heard before me at Sudbury, new *vivâ voce* evidence being put in on behalf of the appellant; and, by consent, the evidence taken before the Recorder also being used; also letters received from some of the Mining Recorders regarding the renewal of Simpson Sanderson's license.

There are two issues involved: first, the validity of Eliza Saville's staking; and, secondly, the validity of the respondents' subsequent staking over the same or part of the same ground.

Dealing with the latter first, I think I must find that on the 21st April, when Simpson Sanderson staked out the property, he had no miner's license. The Recorder for Gowganda certifies that on the 24th April, 1911, he issued to Sanderson a special renewal license. Counsel for the respondents contends that, notwithstanding this, Sanderson may have had his license regularly renewed elsewhere. The presumption, however, must be entirely against such a renewal, as sec. 29 of the Mining Act of Ontario, 8 Edw. VII. ch. 21, expressly forbids the application for or holding of more than one miner's license at the same time, and makes doing so an offence against the Act; and, at all events, upon the whole evidence, I am quite satisfied that Sanderson did not, in the interval between the 31st March and the time he got the special renewal, have any miner's license.

It was argued, however, that the provision in sec. 85 (1) (a) of the Act, saving forfeiture of a claim where a special renewal is taken out within the time provided, would cure the defect. This

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provision, however, is for an entirely different purpose, and has, I think, no application to the original staking out of the claim. The Act is very clear that no right can be acquired by discovery or staking made by one who is not a licensee; and, in fact, a person prospecting or meddling with Crown lands, without having a license, is guilty of an offence against the Act: see secs. 22, 34, 35, and 176. It is only to licensees that the right of acquiring claims is given; and the saving of forfeiture of a claim already acquired is quite a different thing from the acquisition of a claim in the first instance. I have frequently held that, unless the staker, as well as the person in whose name the staking is done, has a license at the time of discovery and staking, no right can be acquired: see *Re Boyle and Young* (1906), 1 Mining Commissioner's Cases 1.

It follows, therefore, that the respondent Simpson Sanderson can have no rights in the property under his own staking.

As to the appellant's staking, the Recorder held it invalid, on the ground that there was disqualification under sec. 57 of the Act, by reason of the appellant's husband, who did the staking, having previously planted a post upon the property without having completed and recorded the staking within the time prescribed by the Act. Upon this point, additional *viva voce* evidence was put in before me; and, considering this with the evidence already before the Recorder, I think I must find that it was not on the property now in dispute that such prior post was planted; and that, therefore, the claim cannot be held invalid upon this account.

The appellant was not as prompt as she should have been in following up the discovery with staking; but the penalty for such delay is that prescribed in sec. 55, namely, that the lands shall be open to any one else to intervene with a proper discovery and staking; and here, as I have found, no one has really done so; and, though I am not satisfied in all respects with the appellant's actions, or rather those of her husband and agent, in connection with the matter, there seems no doubt at all that she has the merit of being the first and original discoverer; and, as no one else has a valid claim to the property, I think the disposition should not be too astute to pick flaws in the title; and, at all events, I think that there is nothing in the evidence sufficient to justify me in finding her claim invalid.



The respondents' claim must be cancelled, and the appellant's claim restored; but, as I think that the appeal was occasioned by the appellant's own fault or delinquency in not submitting her evidence fully before the Recorder, I will make no order for costs.

I find that mining claim T.R.S. 2874, recorded by Simpson Sanderson, on behalf of John Sanderson, is invalid, and I direct the same to be cancelled.

And I find that mining claim T.R.S. 2185, staked out and recorded in the name of Eliza Saville, is valid, and I direct that it be restored to record and the cancellation thereof vacated.

And I make no order for costs.

The appeal of Simpson Sanderson and John Sanderson from the judgment of the Mining Commissioner was upon the following grounds:—

1. At the time of staking the said claim, Simpson Sanderson was entitled to obtain a renewal license, and was entitled to stake out this claim.

2. That there is no evidence to shew that Simpson Sanderson was not the holder of a license.

3. From the evidence, the Mining Commissioner should have decided in favour of the appellant.

4. The Mining Commissioner wrongfully admitted further evidence.

June 11. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

*J. W. Bain*, K.C., and *M. L. Gordon*, for the appellants, argued that the Saville staking was invalid, on the ground that there was disqualification under sec. 57 of the Mining Act of Ontario, 1908, by reason of the fact that Saville, who did the staking, had previously planted a post upon the property, without having completed and recorded the staking within the time prescribed by the Act. The evidence shewed that the post had been planted upon the Saville claim; and the Commissioner was wrong in overruling the Recorder on that point. On the other branch of the case, namely, the subsequent staking by the appellants, counsel contended that the provision in sec. 85 (1) (a) of the Act, saving forfeiture of a claim where a special renewal is taken out within the time provided, cured any defect in recording.

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*G. F. Shepley*, K.C., and *H. S. White*, for *Eliza Saville*, the respondent, argued that, although where there was a staking out there would have to be a recording, putting up a post was not staking out. The prior *Saville* post was not planted on the property now in dispute. The provision in sec. 85 (1) (a) has no application to the original staking out of a claim, and did not cure the defect in the appellants' title. No right could be acquired by discovery or staking made by one who was not a licensee. In fact, a person prospecting without a license was guilty of an offence against the Act. See secs. 22, 23, 27, 34, 35, 176, and 181.

*Bain*, in reply, maintained that the prior *Saville* post was a part staking, and not merely the planting of a post. See secs. 54, 55, and 57 of the Act.

June 26. RIDDELL, J.:—In this appeal from the Mining Commissioner there are several matters to be considered—one of them a matter of law of considerable importance though susceptible of short and simple statement.

Sanderson, who was the holder of a mining license, being at a distance from the Recorder's Office, failed to have his license renewed before the 1st April, 1911; but he went on, and on the 21st April made a discovery and staked two claims. He, on the 24th April, had his license renewed under sec. 85 (1) (a) of the Mining Act; the Mining Commissioner holds that Sanderson can acquire no rights by such a discovery and staking.

The Act provides, sec. 22 (1), that "no person . . . not the holder of a miner's license shall prospect for minerals upon Crown lands . . . or stake out, record or acquire any unpatented mining claim . . . or acquire any right or interest therein." Section 176 (1) provides: "Every person who prospects . . . any Crown lands . . . for minerals otherwise than in accordance with the provisions of this Act or 6 Edw. VII. ch. 11, sec. 103 . . . shall be guilty of an offence against this Act and shall incur a penalty not exceeding \$20 for every day upon which such offence occurs or continues, and upon conviction thereof shall be liable to imprisonment for a period not exceeding three months unless the penalty and costs are sooner paid." Section 181 (1) directs the prosecution

before a Police Magistrate or Justice of the Peace, the Commissioner or a Recorder. This express provision apparently excludes the application of sec. 164 of the Criminal Code; but the offence is none the less a crime. If, for any reason, sec. 164 of the Code does apply, then the act was a crime, quite beyond question.

"*Nullus commodum capere potest de injuriâ suâ propriâ*," and "*Nul prendra advantage de son tort demesne*" (2 Inst. 713), "*Nemo ex suo delicto meliorem suam conditionem facere potest*," are but a few of the forms of statement of a principle recognised in our law.

This is stated by Fry, L.J., in the following words: "No system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person:" *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147, at p. 156. Maybrick had insured his life in favour of his wife, and died by poisoning; his wife was convicted of his murder, her sentence being commuted to penal servitude for life. The executors of Maybrick sued the insurance company, and it was considered that Mrs. Maybrick had no right to receive the insurance, but there was a resulting trust in favour of the estate.

This case was much canvassed in our own case *McKinnon v. Lundy* (1893-4), 24 O.R. 132, 21 A.R. 560; *sub nom. Lundy v. Lundy* (1895), 24 S.C.R. 650. Mrs. Lundy had made a will devising certain lands to her husband; he killed her, and was convicted of manslaughter. Lundy's grantee claimed the land; the trial Judge (Ferguson, J.) held that Lundy could neither take under the will nor inherit, and that the lands should go as on an intestacy, except that Lundy could not inherit any interest. The Court of Appeal unanimously reversed this judgment, drawing a distinction between murder and manslaughter, "something little removed from accident, when all intent to bring about the death, and thereby bringing about the existence of the fund for the profit of the criminal, was necessarily absent:" *per* Burton, J.A., 21 A.R. at p. 562. Another distinction is drawn between the *Cleaver* case and the *Lundy* case by one of the Judges, namely, that in the former the plaintiff was seeking the assistance of the Court—in the *Lundy* case "the defendant Lundy is not seeking the aid of the Court. He does not require it, the validity

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of the will is not disputed. It is admitted to be a good will.  
. . . . :” *per* Maclellan, J.A., 21 A.R. at pp. 566, 567.  
The Supreme Court (24 S.C.R. 650) reversed the judgment of  
the Court of Appeal and restored that of Mr. Justice Ferguson,  
pointing out that “the principle upon which the devisee is held  
incapable of taking under the will of the person he kills is, that  
no one can take advantage of his own wrong:” p. 652.

The principle must, of course, be subject to two qualifications:  
the rights in question must be property rights—Mrs. Maybrick  
and Lundy, after their release, could not be prevented from  
taking another spouse.

So, too, while rights cannot be acquired by a wrong-doer  
from his wrong, “the rule only applies to the extent of undoing  
the advantage gained where that can be done and not to the  
extent of taking away a right previously possessed. Thus, if  
A. lends a horse to B., who uses it and puts it in his stable, and  
A. comes for it and B. is away and the stable is locked and A.  
breaks it open and takes his horse, he is liable to an action for  
the trespass . . . and yet the horse could not be got back,  
and so A. would take advantage of his own wrong. So, though  
a man may be indicted at common law for a forcible entry, he  
could not be turned out if his title is good. . . . :” *per* Bram-  
well, B., *Hooper v. Lane* (1857), 6 H.L.C. 443, at p. 461.

See also *Ockford v. Freston* (1861), 6 H. & N. 466.

In the present case, the discoverer had no rights in the land  
previously possessed—and he founds his claim upon acts done  
by himself, a trespasser, a wrong-doer, one liable to con-  
viction for a crime. It is clear that no such claim can be allowed  
by any Court, nor can it be allowed to be set up against the  
right or claim of any other—unless, indeed, the provisions of  
sec. 85 (1) (a) of the Act save him.

Section 85 (1) (a) does not purport to be in any way in modifi-  
cation of secs. 22, 23, 27. Section 27 provides for the ordinary  
case of the renewal of a license “before the expiration thereof:”  
this renewal is to “bear date on the 1st day of April and shall  
be deemed to have been issued and shall take effect immediately  
upon the expiration of the license of which it is a renewal.” But  
sec. 85 (1) (a) provides for an entirely different case, for what  
is, both in the section itself and in the tariff, item No. 23,



called a "special renewal license." This, so far as appears, need not be dated the 1st April—at all events, it is not provided that it shall come into effect retroactively. It is only issued "to save forfeiture" (tariff, item No. 23), a forfeiture under sec. 84. This, as will be seen, is forfeiture of "all the interest of the holder of a mining claim before the patent thereof has issued." The "special renewal license" is not operative to make that rightful which was wrongful, that innocent which was a crime, but only to exempt from forfeiture the interest already rightfully and lawfully acquired of "the holder of a mining claim."

This part of the Commissioner's judgment is undoubtedly right, and the appeal in that regard should be dismissed.

The other branch of the case is on a simple question of fact, which, in the view I take, it is not necessary to set out.

After a careful examination of all the evidence, I am not able to say that the conclusions of the learned Commissioner are not wholly justified by the evidence. Much depends upon the credibility of Saville, who gave testimony before the Commissioner in conflict with what he had previously said before the Recorder. The explanation given is—to me—not wholly satisfactory; but the Commissioner saw the witness, and he chose to give credit to the testimony before himself—we cannot, I think, interfere.

In a matter of credit to be given to witnesses the Master (or Commissioner) is the final judge of the credibility of these witnesses "according to the well-established practice in Ontario;" *Booth v. Ratte* (1892), 21 S.C.R. 637, 643; *Hall v. Berry* (1907), 10 O.W.R. 954; *Bishop v. Bishop* (1907), 10 O.W.R. 177.

The appeal should be dismissed on all grounds taken and with costs.

BRITTON, J.:—I agree that the appeal should be dismissed with costs.

FALCONBRIDGE, C.J.:—And I.

*Appeal dismissed.*

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June 28.

## THOMSON V. PLAYFAIR.

*Contract—Sale of Timber—Statute of Frauds—Memorandum in Writing—Ostensible Agent—Ratification.*

*Held*, affirming the judgment of RIDDELL, J., 25 O.L.R. 365, that the agreement for the sale of timber alleged by the plaintiff was sufficiently evidenced by a memorandum in writing—the copy of the receipt signed by B., acting as if the defendants' agent in the transaction, and given to the plaintiff's agent, read with the receipt itself—to satisfy the Statute of Frauds; and (2) that the transaction was ratified by the defendants.

APPEAL by the defendants Playfair and White from the judgment of RIDDELL, J., 25 O.L.R. 365.

May 8 and 9. The appeal was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and LENNOX, J.

*R. McKay*, K.C., and *F. W. Grant*, for the appellants. Neither Hugh C. Thompson nor C. E. Byers had any authority to enter into any contract on behalf of Playfair and White for the purchase of Yeo Island. This being so, it is clear that, even if any contract had been entered into by either Thompson or Byers in writing, within the provisions of the Statute of Frauds, it would not have been binding on the appellants. There is no evidence of any act on the part of Playfair and White, in any way communicated to the plaintiff, or her agent, affirming or ratifying the alleged contract: *Marsh v. Joseph*, [1897] 1 Ch. 213, at pp. 238 and 247. The document signed in the name of Playfair and White by the defendant Byers, was merely given as a copy of the receipt which he himself was taking from the plaintiff's agent, and the document is expressly so marked on its face: *Keighley Maxsted & Co. v. Durant & Co.*, [1901] A.C. 240. At the time at which it is alleged that ratification took place, there was no evidence of any knowledge on the part of Playfair and White of what the alleged contract was. There is, in any event, no sufficient memorandum within the Statute of Frauds. The receipt does not purport to be an agreement on the part of the appellants; it does not state the name of the party purchasing, and does not state the name of the vendor in any part of it: *Bradley v. Elliott* (1906), 11 O.L.R. 398; *Potter v. Duffield* (1874), L.R. 18 Eq. 4; *Skelton v. Cole* (1857), 1 DeG. & J. 587; *Williams v. Jordan* (1877), 6 Ch. D. 517; *Thomas*

v. *Brown* (1876), 1 Q.B.D. 714; *Green v. Stevenson* (1905), 9 O.L.R. 671, at pp. 675, 679; *Vandenbergh v. Spooner* (1866), L.R. 1 Ex. 316; *White v. Tomalin* (1890), 19 O.R. 513; *Bohan v. Galbraith* (1907), 13 O.L.R. 301, 15 O.L.R. 37; *Williston v. Lawson* (1891), 19 S.C.R. 673. The whole agreement must appear in writing: *Queen's College v. Jayne* (1905), 10 O.L.R. 319; *Hussey v. Horne-Payne* (1879), 4 App. Cas. 311; *Bristol Cardiff and Swansea Aerated Bread Co. v. Maggs* (1890), 44 Ch. D. 616, and the cases cited therein. That the sale of standing timber is within the Statute of Frauds is clearly and expressly decided by the case of *Hoeffler v. Irwin* (1904), 8 O.L.R. 740, at pp. 745 *et seq.* There were no acts of part performance sufficient to take the case out of the statute: Fry on Specific Performance, 5th ed., pp. 31, 283, 291, 294 (sec. 585), and 295 *Thynne v. Earl of Glengall* (1847), 2 H.L.C. 131, at p. 158; *Alderson v. Maddison* (1881), 7 Q.B.D. 174, affirmed in the House of Lords, *Maddison v. Alderson* (1883), 8 App. Cas. 467; *Harrison v. Mobbs* (1908), 12 O.W.R. 465, at p. 467.

*G. H. Kilmer*, K.C., and *D. Robertson*, K.C., for the plaintiff. There was ample evidence to justify the learned trial Judge in finding that the defendants Playfair and White adopted and ratified the contract entered into on their behalf with the defendant Byers. Ratification may be inferred from silence alone: Evans on Principal and Agent, 2nd ed., pp. 75, 79; *Ferguson v. Carrington* (1829), 9 B. & C. 59. The words "on account of purchase" mean on account of agreement to purchase: *Long v. Millar* (1879), 4 C.P.D. 450, at p. 454. The defendants Playfair and White had knowledge of what the contract was, at the time of the alleged ratification, because they had received the receipt signed by W. A. Thomson, the plaintiff's agent. The action of an unauthorised agent in entering into a contract where one is required under the Statute of Frauds, intending to contract on behalf of another, but without his authority, may be ratified by that other: *Bolton Partners v. Lambert* (1889), 41 Ch.D. 295, followed in *Re Portuguese Consolidated Copper Mines Limited, Ex p. Badman, Ex p. Bosanquet* (1890), 45 Ch. D. 16, at p. 31; *Durant & Co. v. Roberts and Keighley Maxsted & Co.*, [1900] 1 Q.B. 629. Although this case was reversed in *Keighley*

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*Maxsted & Co. v. Durant & Co.*, [1901] A.C. 240, it was on the ground that the agent who made the contract did not profess at the time of making it to be acting on behalf of a principal. The inference is, that the person paying the money is the purchaser and the person receiving it the vendor: *Green v. Stevenson*, 9 O.L.R. 671; *Carr v. Lynch*, [1900] 1 Ch. 613. There was a sufficient memorandum within the statute. It is sufficient under the Statute of Frauds if the terms of the contract can be collected from several distinct writings, which refer to each other in such a manner as to shew that they relate to the same transaction: *Wylson v. Dunn* (1887), 34 Ch. D. 569; *Studds v. Watson* (1884), 28 Ch. D. 305; *Pearce v. Gardner*, [1897] 1 Q.B. 688. The plaintiff relies not on the duplicate receipt alone, but on the receipt signed by the plaintiff's agent, a copy of the receipt signed "Playfair and White, per C. E. Byers," and the order; and it is submitted that they all clearly refer to one another: *Cave v. Hastings* (1881), 7 Q.B.D. 125. The receipt signed by the plaintiff's agent is sufficient as to terms: *Devine v. Griffin* (1854), 4 Gr. 603; *Coles v. Trecothick* (1804), 9 Ves. 234; *Standard Realty Co. v. Nicholson* (1911), 24 O.L.R. 46. The letter of Mr. Grant, solicitor for the appellants, can likewise be read to assist in making a complete memorandum: *In re Hoyle*, [1893] 1 Ch. 84; *In re Holland*, [1902] 2 Ch. 360, at p. 383. If any parol evidence is required to connect the receipt, the copy of the receipt, and the order, it can be given: *Ridgway v. Wharton* (1856), 6 H.L.C. 238, at p. 257. We refer also to *Cameron v. Spiking and Teed* (1877), 25 Gr. 119.

*McKay*, in reply, referred to *Campbell v. Dennistoun* (1873), 23 C.P. 339.

June 28. The judgment of the Court was delivered by MEREDITH, J.A.:—There are just two substantial questions involved in this appeal: (1) Is there a sufficient memorandum in writing to satisfy the requirements of the Statute of Frauds? And, if so, (2) are the defendants bound by it?

The receipt given for the payment of \$100 is quite sufficient to bind those who gave it, but obviously it could not bind the defendants, who did not; the plaintiff must rely on other writing for that purpose, which she does: at the time when this receipt



was given, a copy of it was made, headed with the words "copy of receipt;" Byers, acting as if their agent in this transaction, signed it; and this writing was given to the plaintiff's agent; the other being retained by Byers and afterwards sent by him to his masters, the defendants.

If the word "approved," or "correct," or something of that character, had been added to either writing, and had been thereunder signed by the defendants, I can have no doubt that the writing would be a memorandum of the sale sufficient to satisfy the requirement of the enactment; and I can find no good reason against attributing to the copy of the receipt the same meaning as if such a word had been inserted above the signature. The copy of the receipt was made, signed, and given as binding evidence of the transaction; it was a certification, in the defendants' names, of that which was set out in the receipt. Then, reading the two writings together, as of course one may, there is, in my opinion, a sufficient memorandum signed by the parties to be charged as well as by the other parties.

On the other point, I am unable to differ from the trial Judge in his finding that the transaction was ratified by the defendants, and so is binding upon them, whether or not Byers or Thompson—who also was an agent of the defendants and took part with Byers in making the agreement—had authority to make it.

An order was given by Byers on the defendants to pay the \$100 "on account of the purchase of Yeo Island," and it was paid; the transaction was so entered in the books of the defendants: for a long time before the transaction, the defendants had an eye to the purchase of this property; and investigation to some extent had been made for that purpose. On the 23rd May, the defendants wrote to Byers, "Trust you will find a lot of timber on Yeo Island;" on the following day, Byers wrote to them, "We closed for the Island, at least we have bound the bargain;" and on the same day, they wrote to him, "I am pleased that you have secured Yeo Island, and trust it will turn out a good one for cedar."

These things are not conclusive, but, with others, support the finding, by the trial Judge, of ratification; and, in addition to that, seem to me sufficient evidence of an antecedent authority.

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I cannot, however, find anything in the evidence which would support this transaction on the ground of part performance.

Although not altogether on the same grounds, I would affirm the judgment directed to be entered by the trial Judge.

*Appeal dismissed.*

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[IN THE COURT OF APPEAL.]

MAYBURY v. O'BRIEN.

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*Vendor and Purchaser—Contract for Sale of Land—Authority of Agent—  
Question of Fact—Appeal—Reversal of Finding of Trial Judge.*

The judgment of CLUTE, J., 25 O.L.R. 229, in favour of the plaintiff, in an action for specific performance of an alleged agreement for the purchase and sale of land, was reversed, upon the ground that P., who was said to be the agent of the defendant, was not, upon the facts in evidence, authorised to make the particular agreement sued upon.

*Per* GARROW, J.A.:—P. was not the agent of the defendant for any purpose.

APPEAL by the defendant from the judgment of CLUTE, J., 25 O.L.R. 229.

May 6. The appeal was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and LENNOX, J.

W. M. Douglas, K.C., for the defendant. Pardee was not the agent of the defendant, but of the plaintiff, and he had no authority whatever to bind the defendant. In all the negotiations with the defendant relating to the alleged sale, Pardee was acting for and on behalf of himself or the plaintiff. The receipt in question was drawn up behind the back of the defendant, solely for the purpose on the part of Pardee of giving some advantage to his client, the plaintiff; and the receipt, either by implied authority or otherwise, is not binding upon the defendant: *Canadian Pacific R.W. Co. v. Rosin* (1911), 2 O.W.N. 610. The receipt does not constitute a sufficient memorandum as required by the Statute of Frauds: first, because Pardee was not the agent of the defendant and had no authority to sign the receipt; and, again, because the name of the defendant, the person on whose behalf the receipt is now said to have been given, did not in any way appear therein, and extrinsic evidence cannot be admitted to identify him. Further, the

receipt does not contain the terms and conditions of the sale. And, besides, the receipt is indefinite and inconclusive. The learned trial Judge erred in holding that a certain memorandum made by the defendant in his own book satisfied the Statute of Frauds, and that this memorandum and the receipt meant the same thing. The terms of the alleged contract, as set forth in the receipt, are too vague and indefinite to be specifically performed. I refer to the following cases on the Statute of Frauds: *White v. Tomalin* (1890), 19 O.R. 513, at p. 521; *Williams v. Lake* (1859), 2 E. & E. 349; *Potter v. Duffield* (1874), L.R. 18 Eq. 4; *Jarrett v. Hunter* (1886), 34 Ch.D. 182; *Filby v. Hounsell*, [1896] 2 Ch. 737; *Bradley v. Elliott* (1906), 11 O.L.R. 398; *Rosenbaum v. Belson*, [1900] 2 Ch. 267; *Thuman v. Best* (1907), 97 L.T.R. 239; *Chadburn v. Moore* (1892), 61 L.J. Ch. 674.

*A. W. Anglin*, K.C., for the plaintiff. The plaintiff's case is founded not alone upon the receipt signed by Wilcox & Pardee, but upon the memorandum made by the defendant, and upon other writings proved at the trial. Pardee was, to the defendant's knowledge, acting as agent of a probable purchaser, whose name was not at the time disclosed to the defendant, and he was expressly authorised by the defendant to sell the defendant's equity in the land in question, at the price and on the terms mentioned in the receipt and memorandum; and this authority to sell carried with it the authority to sign a memorandum in writing sufficient to satisfy the Statute of Frauds: *Rosenbaum v. Belson*, [1900] 2 Ch. 267; *Canadian Pacific R.W. Co. v. Rosin*, 2 O.W.N. 610; *John Griffiths Cycle Corporation Limited v. Humber & Co. Limited*, [1899] 2 Q.B. 414. The receipt and the memorandum mean the same thing; the difference being in expression, and not in meaning or substance. Neither the receipt nor the memorandum is indefinite or inconclusive: *McDonald v. Murray* (1883-5), 2 O.R. 573, at p. 581, 11 A.R. 101, at p. 122. The receipt without the counterfoil is sufficient as to parties. It discloses both a vendor and a purchaser, and it was proved that Pardee was agent for the defendant: *Filby v. Hounsell*, [1896] 2 Ch. 737; *Morgan v. Johnson* (1911), 3 O.W.N. 297, at p. 300. The defendant is shewn to be the vendor by the counter-

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foil, which, with the receipt, formed one document, and they are still to be so regarded, though severed, and the counterfoil retained by the defendant's agent: *Pearce v. Gardner*, [1897] 1 Q.B. 688. Should the counterfoil and receipt be regarded as separate documents, their relation may be shewn by parol evidence: *Oliver v. Hunting* (1890), 44 Ch.D. 205, at p. 209; *Kennedy v. Oldham* (1888), 15 O.R. 433. The defendant is shewn to be the vendor by the correspondence subsequent to the receipt: *Buxton v. Rust* (1872), L.R. 7 Ex. 279, at p. 282. The defendant's memorandum is sufficient to bind him under the Statute of Frauds. It was made in his own book, in his own writing; and the character "O'B.", contained in the memorandum, is a sufficient signature under the statute: *In re Hoyle*, [1893] 1 Ch. 84; *Newell v. Radford* (1867), L.R. 3 C.P. 52; *In re Holland*, [1902] 2 Ch. 360, at p. 385. There was a concluded agreement of sale and purchase. The defendant's memorandum and his solicitor's letter of the 23rd June are inconsistent with the defendant's contention that negotiations were still pending: *Rossiter v. Miller* (1878), 3 App. Cas. 1124; *Gray v. Smith* (1889), 43 Ch.D. 208. "Cash" is a relative term in real estate transactions. It ordinarily means money in exchange for the shewing of title. See *Andrews v. Calori* (1907), 38 S.C.R. 588, and the cases cited therein; *Hussey v. Horne-Payne* (1879), 4 App. Cas. 311, at p. 321; *McDonald v. Murray*, 11 A.R. 101.

*Douglas*, in reply.

June 28. GARROW, J.A.:—Appeal by the defendant from the judgment at the trial before Clute, J., without a jury, in favour of the plaintiff. The action was brought to enforce specific performance of an alleged agreement in writing by the defendant to sell to the plaintiff certain lands in the town of Sault Ste. Marie. The agreement is thus pleaded and set out in the statement of claim:—

"2. On or about the 16th day of June, 1911, the defendant agreed to sell to the plaintiff, and the plaintiff agreed to buy from the defendant, part of lot 19 on the north side of Queen street in the said town of Sault Ste. Marie, being the westerly half of said lot, south of King street, in the said town, except the westerly 26½ feet, for the price of \$6,412.50, payable as



follows: \$200 down, balance of \$1,937.50 after approval of title and documents—portion of equity about \$1,000 equally on December 11 and June 12, remainder semi-annually, about \$500 in Sept. and March each year until paid. Interest 7 per cent. A note or memorandum of which agreement is in writing and signed by Wilcox and Pardee by John B. Pardee, who were thereunto by the defendant lawfully authorised.”

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The agreement referred to reads as follows:—

“Sault Ste. Marie, June 16th, 1911.

“Received from Alfred W. Maybury two hundred dollars, a/c purchase 28½ ft. x 132, being pt. lot 19, N. Queen adjoining Sault Star Bldg. on east. Price \$225.00 per front ft. Terms \$200.00 down, blee. of \$1,937.50 after approval title and documents. \$500.00 in Sept. and Mch. Blee. of equity, about \$1,000, equally on Dec. 11 and June 12. Remainder semi-annually, about \$500.00, in Sept. and Mch. each year until paid. Int. 7 per cent. Purchase-price \$6,412.50.

“Wilcox & Pardee

“by Jno. B. Pardee.”

The defendant denied making the agreement, denied that Wilcox & Pardee were, or that John B. Pardee was, his agents, or agent, or had his authority to make such an agreement, and pleaded the Statute of Frauds as a defence.

At the trial, an application was made by the plaintiff to amend by adding to the paragraph of the statement of claim before set out these words—“and a further note or memorandum of which is also in writing and signed by the defendant;” which note or memorandum, consisting of an entry made at the time by the defendant in his note-book. is as follows:—

“June 15 Sold 28½ feet N. Queen to J. B. Pardee

“Price 225.00 per foot one 1/3 cash

“Total purchase-price 6,412.50

“1/3 cash 2132.50

“Balance of O'B. equity payments Dec. &  
June. Interest 7 per cent.

“Keenan payments to be assumed as per  
agreement

“Cost of property 4,788.00

“1,624.50.”

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After some evidence had been given, the amendment was allowed. This memorandum was unsigned, but it is said the "O'B. equity" means the defendant's equity in the lands; and that, therefore, this memorandum, written by himself, in which he uses the initials of his name, is a sufficient signature under the statute. The memorandum, however, was made in the course of the negotiations; and, when made, it is clear that no agreement had then been arrived at.

The learned trial Judge was of the opinion: (1) that the defendant had appointed Mr. Pardee his agent, and had authorised him to make the agreement in question; and (2) that the agreement referred to and set out in the statement of claim was sufficient to satisfy the Statute of Frauds.

My difficulty is to accept the first proposition, which, with deference, I think was not proved. This proposition seems to divide itself into two questions: (1) was Mr. Pardee an agent for the defendant for any purpose? and (2), if he was, was he or his firm authorised to make the particular agreement sued on? And I think both should be answered in the negative. They are both, of course, questions of fact; and, in dealing with them, I am bound to regard the learned trial Judge's statement that he prefers the evidence of Mr. Pardee to that of the defendant when they differ.

The onus was upon the plaintiff to prove by reasonable evidence an agency in fact, There were and are no circumstances in the case to justify a finding that the alleged agency was an agency in law, or, in other words, arose by estoppel; and, indeed, no such contention is advanced.

Now what is the evidence? And I will take Mr. Pardee's own statement for it. He says he had frequently acted for the plaintiff in buying lands. He acted for him in making a resale of the same lands to Mr. Plummer, at an advanced price. At the opening of the negotiations in question he went to the defendant on behalf of the plaintiff. No claim is made that, at or prior to that time, he was acting or had any authority to act,

either personally or for his firm, for the defendant. He did not inform the defendant for whom he was acting, but the conversation implied that he was acting for a principal:—

“I mentioned that *my purchaser* would like to have an answer at once.”

“Q. He never said anything to you about \$200 did he? A. No; I do not think he did.

“Q. And he never said anything to you about signing any receipt did he? A. No.

“Q. You and Mr. O'Brien were dealing at arm's length, were not you? A. We were dealing in the office there.

“Q. You know what I mean? A. No, I do not know what you mean by arm's length.

“Q. You were dealing as one man would with another in a business transaction. A. Exactly.

“Q. There was no association between you? A. No.

“Q. There was no common interest? A. No.

“Q. You were trying to get the best terms you could for your client? A. Yes.

“Q. And he was trying to get the best terms he could for himself? A. Yes.

“Q. You for Maybury, he for O'Brien? A. Exactly.

“Q. He told you he would not sell unless he had a third cash? A. Exactly.

“Q. Which was what you understood? A. Yes.

“Q. And you finally came down to the terms one-third cash? A. Exactly.

Q. What did you understand by that? A. A third of the total payment.

Q. Cash down on the signing of the agreement? A. I presume so, yes.

“Q. And, so far as you are concerned, is that all that you had to do with it? A. That is all.

“Q. Then you signed the receipt, exhibit 3, as you thought, in pursuance of some authority given you by Mr. O'Brien? A. No, I signed it as we do generally; we take a deposit when we sell property.

“Q. So that that was quite apart from any actual authority

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given you? A. Yes, I cannot recall any actual amount named as a deposit by Mr. O'Brien.

"Q. Nothing was said about a deposit, was there? A. Well, it went without saying, if we sold the property, we would take a deposit.

"Q. That is your usual practice? A. Yes.

"Q. And there was no other mention of any terms or conditions in connection with the agreement than those which you have indicated? A. Exactly."

Then, after the personal interview, what took place was entirely over the telephone:—

"Q. You got as far as stating that Mr. O'Brien rose from his desk, and you took that as an intimation that the interview was over, and you left? A. I did.

"Q. And you stated that, immediately before that, you stated to Mr. O'Brien that the purchaser would consent to the increase in the cash payment? A. No, I did not.

"Q. What was said? A. Mr. O'Brien said to me after rising from his desk that he would call me up in the evening and let me know the best terms he would sell on—the best cash payment . . . ."

"Q. Mr. O'Brien did not call you up? A. Mr. O'Brien did not call me up that evening. On the following morning I called Mr. O'Brien up at his hotel. I was informed that he was not in. I left word for him to call me up when he did come in. He did so, I should say in the neighbourhood of ten or fifteen minutes afterwards. He stated to me that he would sell on the proposed terms of a third down, the balance of his equity, about \$1,000, in December, 1911, and June, 1912, at 7 per cent. interest, and the purchaser assume Mr. Keenan's payments under Mr. Keenan's agreement. I informed Mr. O'Brien over the telephone that, if I could sell on those terms, I would do so without consulting him further. He said that was satisfactory. Mr. Maybury came into the office a few minutes afterwards, and I told him I was able to sell Mr. O'Brien's property at the price of \$225 a foot under the terms as he stated to me. Mr. Maybury stated to me that he would take the property. I then called up Mr. O'Brien, got him on the 'phone in Mr. Maybury's presence,



and told him that I had sold the property. Mr. O'Brien answered 'All right.' I asked him who was looking after his interests in the matter, and he informed me that Boyce & Hayward—

"Q. What next? A. Mr. Maybury then gave me \$200—a cheque for \$200—to bind the bargain, and I gave him a receipt for it."

I am wholly unable, even without the defendant's denial, to see in this evidence, which is the whole story upon that branch of the case, any reasonable evidence that the defendant appointed or agreed to appoint Mr. Pardee or his firm his agents. A man is not to have an agent thrust upon him in that way. The appointment necessarily results from a contract, in which there must appear in some shape an offer upon the one hand and an acceptance upon the other, out of which there grow the mutual rights and responsibilities of the relation. Down to the conversation over the telephone, there is not the very slightest room even to pretend that either party contemplated the alleged agency. Mr. Pardee was there in the defendant's office as the representative of the plaintiff, and of him alone. He was the "purchaser" who wanted an immediate answer, and it was in his interests, and not the defendant's, that Mr. Pardee haggled over the down-payment with the defendant, which he wished to have reduced. The defendant's impression of what occurred is set out in the memorandum in his note-book before set out, put in by the plaintiff, which he says he read over to Mr. Pardee, who does not, so far as I see, deny the statement, in which the defendant states that the sale was to Mr. Pardee himself. This memorandum, fairly read, is utterly inconsistent with an agency such as that alleged, or of any other kind.

Then, in the conversation by telephone, the expressions, "I informed Mr. O'Brien that, if I could sell on these terms, I would do so," and, "I told him I had sold the property," and the defendant's reply, "All right," are to be read in conjunction with the earlier course of the negotiations, and are, I think, perfectly consistent with Mr. Pardee still being, in the defendant's opinion, the agent only of the purchaser, and are wholly insufficient, in the light of all the evidence, to create, in such an

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obscure and indirect manner, the important relation now claimed for them of also making him the agent of the vendor.

Then, upon the second question, as to the alleged authority to make the particular agreement which was made. The instruction, on Mr. Pardee's own shewing, was to make an agreement upon the term (among others) of one-third cash on signing the agreement, and he made no such agreement. What he did make was an agreement stipulating for \$200 down, and the balance of the one-third cash payment when the title and documents were accepted. I cannot, with deference, agree that these mean the same thing. It is, however, not exactly that, but whether an explicit instruction has been followed. It is, in other words, a question of power and authority pure and simple; and, in my opinion, there was no power or authority to substitute for one-third cash on signing the agreement, the term of \$200 down and the balance when the title and documents were accepted. The latter, doubtless, had, in Mr. Pardee's eyes, the merit of giving him so much of the defendant's money in hand, in case there should subsequently be a dispute about his agency for the defendant, and its resulting commission, which if he did not claim, he would be a very unusual agent.

Upon the whole, and without entering upon some of the other matters discussed before us, which, in my opinion, become unimportant in the view which I take of the facts, I think, for the reasons I have given, that the appeal should be allowed and the action dismissed with costs.

MACLAREN, J.A.:—I agree.

MEREDITH, J.A.:—Accepting as accurate, as the learned trial Judge did, the testimony of the witness Pardee as to his conversation, by telephone, with the defendant, referring to the sale in question, this witness was authorised by the defendant to sell the land in question, on the terms they had before discussed. It can mean that and cannot mean anything else.

But one of the terms was that one-third of the whole price was to be paid in cash. The agreement in question provides for payment of "\$200 down, balance of \$1,937.50 after approval

title and documents." It is contended that these terms are substantially the same; that "after approval title and documents" is the same as "cash;" and, if the whole of the one-third of the price were to be paid on approval of title and documents, there might be a good deal to be said in favour of the contention; whether enough to support it or not need not be considered; for, if it be so, then the agent has departed from the terms in accepting \$200 down. If the cash payment were made on accepting title, it would come into the hands of the vendor himself if he desired it; as the agreement is made, it may never come to his hands; I can find in the evidence no authority for splitting the cash payment; and the objection to the agreement on that score is not altogether a fanciful one; or might not be in many cases. It is plain that the agent deliberately split the single cash payment into a "down" payment and a payment on completion of the sale, with the advantage to him of having \$200 in hand, an advantage of some substantiality in case of disputation as to a right to commission upon the sale.

On this ground I would allow the appeal.

MAGEE, J.A., and LENNOX, J., concurred.

*Appeal allowed.*

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[IN THE COURT OF APPEAL.]

IMPERIAL PAPER MILLS OF CANADA LIMITED V. QUEBEC BANK.

*Banks and Banking—Advances by Bank to Paper Company—Security on Pulpwood Logs—Antecedent Written Promise—Validity—Bank Act, sec. 90—Proceeds of Logs—Claim of Debenture Mortgagees—Floating Security—Exception—"Logs on the Way to the Mill"—Description—Identification.*

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The plaintiff company, having the right to cut spruce and other timber upon a large area of Crown lands, in September, 1903, executed a mortgage deed of trust in favour of a trust company, for £100,000, upon "the whole property, assets, rights, privileges, and undertaking of the company, present and future (excepting logs on the way to the mill)," to secure bonds of the plaintiff company to that amount; and in November, 1903, executed a similar debenture mortgage, with an exception in the same words, for £200,000, in favour of C. and S.:—

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*Held*, that the exceptions did not apply only to "logs on the way to the mill" at the respective dates of the mortgages, but covered logs on the security of which the defendant bank from time to time made advances to enable the plaintiff company to carry on its business of manufacturing paper. The debenture mortgages were to be "floating securities," and the plaintiff company was to be allowed to carry on its business in the usual manner. From the time the logs were cut in the forest until they reached the mill, they were on their way to the mill.

The advances were made by the bank in accordance with antecedent agreements, in writing, to give security upon the logs. The promise in the first transaction was of security for the amounts to be advanced to enable the company to get out a quantity of pulpwood logs estimated at 15,000 cords, and so in the subsequent transactions:—

*Held*, that there had been a substantial compliance with sec. 90 of the Bank Act, R.S.C. 1906, ch. 29: it was not necessary that the precise amount of the debt to be secured should be stated in the antecedent promise in writing; nor were the securities invalid for want of compliance with the provisions of the Act in regard to the description of the goods; the goods were sufficiently marked and could be readily identified.

*Held*, therefore, that the bank was entitled to the proceeds of the logs, as against the liquidator of the company and the debenture mortgagees. Judgment of BRITTON, J., affirmed.

ACTION by the Imperial Paper Mills of Canada Limited and E. R. C. Clarkson against the Quebec Bank and George Gordon & Co., to restrain the defendants from interfering with certain logs in McCarthy creek, and for other relief.

March 6, 7, 8, 9, and 17, 1911. The action was tried by BRITTON, J., without a jury.

C. A. Masten, K.C., J. H. Moss, K.C., and R. B. Henderson, for the plaintiffs.

F. E. Hodgins, K.C., and D. T. Symons, K.C., for the defendants.

August 11, 1911. BRITTON, J.:—E. R. C. Clarkson was appointed receiver of the assets of the above named company, comprised in or covered by a mortgage securing debentures of that company. This appointment of Mr. Clarkson was made by an order of the Court dated the 7th October and 16th November, on which judgment was entered on the 22nd November, 1907, in an action of *Diehl et al. v. Carritt et al.* Carritt *et al.* were mortgagees in the mortgage mentioned—this action at the instance of Clarkson, the receiver, was commenced on the 9th day of May, 1908. Prior to that date, there were spruce and balsam logs in the water, upon the bed, and upon the banks of McCarthy creek. This creek is only a creek in spring and fall—



a marsh and quite dry in summer. Water is required to be stored at times to get the logs out, even in spring-time. These logs were cut and brought from the bush to McCarthy creek by the company during the season of 1905-6, and the Quebec Bank claimed to hold these as security for certain moneys advanced by the bank to the company. There was also a quantity of jack-pine in the Sturgeon river and other adjacent waters, in reference to which there was an agreement between the bank and the company; but by an order of the Court dated the 14th day of May, 1908, this jack-pine was excluded from the operation of the injunction order.

By reason of these spruce and balsam logs remaining so long in the condition mentioned, they were daily becoming of less commercial value. Why they were not dealt with in the years 1906-7 does not clearly appear, but in 1908 all seemed to realise that, if anything of money value could be gotten out of them, they should be brought down to Sturgeon Falls, and, in my opinion, even below the Falls, if necessary, in order to find a market for them or get them cut up. Negotiations were entered upon between the receiver and the bank before the Official Referee, having in view the bringing of the logs to Sturgeon Falls and determining the rights of all in respect of them.

From what took place at the trial, one would suppose that reasonable efforts would have resulted in an arrangement by which further litigation would have been avoided. The property is of small value, considering the large transactions between the defendant bank and the plaintiff company. It is said that these negotiations before action were without prejudice, and I so treat them.

When the attempt to come to an amicable arrangement failed, the Quebec Bank employed the defendant Gordon to take these logs from McCarthy creek and drive them to Sturgeon Falls. Gordon and his men took possession of the logs in pursuance of that agreement. The receiver, upon leave, commenced this action, and obtained an interim injunction. The endorsement upon the writ is as follows: "The plaintiffs' claim is for an injunction restraining the defendants, or either of them, their servants, etc., from taking possession of or in any way

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interfering with the logs of the plaintiff company in the McCarthy creek, the Sturgeon river, Lefrois lake, or in any other portion of the concession of the plaintiff company, which logs are claimed by E. R. C. Clarkson, now in his custody and possession as receiver of the said company.”

In the plaintiffs’ statement of claim, they allege an agreement and intention on the part of the defendants to take these logs down the Sturgeon river and over the Sturgeon falls, for the purpose of preventing these logs being purchased for or used at the plaintiffs’ mill. Then the plaintiffs attack the securities held by the bank, and ask an adjudication in this action in reference to these. At the trial, counsel for the plaintiffs thought the statement of claim went too far, and contended strongly that the only judgment should be: (1) a declaration that the interlocutory injunction was properly granted; (2) that the logs in question prior to the date of the writ were in possession of the receiver; (3) that the bank wrongfully disturbed the receiver in his possession; and (4) that damages have resulted, and directing a reference to determine the amount of such damages. The plaintiffs’ counsel however, argued that, if the rights of the parties should be considered further in this action, the claim of the bank should be declared invalid, and the proceeds of the McCarthy creek logs should be paid over to the receiver. The plaintiffs, in the alternative, asked that, if the validity of the bank’s securities, the amount and priorities, be not determined now, the defendants be restrained from interfering with the property until they have made a proper application to the Court in *Diehl v. Carritt* for leave to do so; and that in the meantime, and until they have established the validity of their securities and their priority as against the bonds, etc., the proceeds of the logs in question in this action be paid into court in the action of *Diehl v. Carritt*, to abide the result of such application by the bank.

In view of the issues raised by the plaintiffs, and having regard to the respective orders of the 14th and 28th May, 1908, it is my duty to deal with the whole matter, and I do so in the hope at least of saving some time and money to the parties.

On the 14th May, 1908, the injunction order was amended by

allowing the bank to continue to manufacture and deal with jack-pine in the Sturgeon river and other waters, and to continue the drive of the McCarthy creek logs until they should reach Sturgeon falls.

On the 28th day of May, the Court made a further order that the receiver proceed with all despatch and sort out and place on the bank of the Sturgeon river all the spruce and balsam in question in this action, etc. It was stipulated that all that was to be done was to be without prejudice to the rights which the parties may be found to have therein, and such rights, if any, were not to be considered as changed by such sorting out and placing on the bank. And it was further provided by that order that the trial should proceed, and that, in case the Quebec bank is found entitled to the spruce and balsam, or portions of it, then the plaintiff company and receiver are to be liable for damages to the bank in respect of such portion, and such damages are to be a charge on the assets of the company, in priority to the claims of the bondholders. It was further ordered that, if the bank was held not to be entitled to the logs in question or any portion thereof, it should be reserved for the trial Judge to determine whether any order should be made in respect to the expenses incurred by the bank in driving the logs, to which the said bank may not be entitled. By that order, not only jack-pine, but all logs other than spruce and balsam, were made exempt from the injunction herein.

On the 26th September, 1908, and before this action was brought on for trial, an order was made for winding-up the plaintiff company, and in the winding-up proceedings the plaintiff Clarkson (receiver) was appointed liquidator, and on the 19th November, 1908, he was added as such liquidator a party plaintiff in this action. Up to the time of Mr. Clarkson's appointment as liquidator in the winding-up of the plaintiff company, his only pretence or claim of right to interfere with the spruce and balsam logs in question was as receiver of the assets of the company covered by the mortgage dated the 18th November, 1903. This is a mortgage to Carritt and Sinclair as trustees to secure an issue of £200,000 of debentures, and it covers

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vast areas of properties particularly described in the mortgage; and also all the rights, privileges, and concessions to cut pulp and other wood given by a certain agreement by Her Majesty the Queen, 6th October, 1898, to the Sturgeon Falls Pulp Company, assigned to the plaintiff company, which agreement was confirmed and extended by His Majesty the King, 15th December, 1901, and generally it covers all the assets of the company "excepting logs on the way to the mill." This mortgage is, however, made subject to a mortgage made by the Sturgeon Falls Pulp Company to the Toronto General Trusts Corporation, dated the 1st May, 1899.

It was not argued that anything in that mortgage affected the matter now in controversy. It was also subject to a mortgage deed of trust, given by the company to "The Trustees Executors and Securities Insurance Corporation Limited," dated the 22nd September, 1903, to secure an issue of bonds to the amount of £100,000 stg. This mortgage covers practically all the properties mentioned in the later debenture mortgage, and it also exempts "logs on the way to the mill." Both mortgages clearly contemplate and provide that what was desired, and what the mortgagees might do, was subject to this, that the mill should continue as a going concern. That was in the interest of all the parties. The fair inference is, that, apart altogether from money raised by loan upon debentures, the mill might require to borrow money from banks or other lenders, in order to get out pulp-wood. It was in the interest of the mill that wood, so got out, should get to the mill, be sold to and used at the mill, free from any interruption or interference by mortgagees—while wood was on the way to the mill. The exception of logs "on the way to the mill" is not only from the grant (see p. 14 of the mortgage), but also from the charge (see top of p. 15), so that, even if the logs were not excepted, the company was not to be prevented from dealing with such assets in the ordinary course of and for the purpose of carrying on its business. That, of course, is not the question here; but it aids in interpreting the exception, as applying not only to logs on the way to the mill, at the date of the mortgage, but applying as excepted from the class of future assets such as mentioned on p. 14 of



that mortgage. The spruce and balsam logs in question here were logs on the way to the mill; they were cut for the mill, if the mill paid for them. They were started for the mill and hauled to McCarthy creek as part of the journey "on the way to the mill," and halted there for want of water or money, for the time being, to take them further.

The plaintiff receiver was appointed by the order mentioned above, on which judgment was signed the 22nd November, 1907. See clause 8. He was appointed receiver on behalf of Diehl *et al.*, holders of the mortgage debentures. The action was brought by them as debenture-holders, and on behalf of all other debenture-holders, and as such receiver he could deal only with the property covered by the mortgage. The debenture-holders under either mortgage had not, by virtue of such mortgage, any right to interfere with the spruce and balsam logs. The receiver was never in actual possession of the logs at any time before the commencement of this action. Constructive possession would be with the owner. The Quebec Bank, prior to the issuing of the writ herein, made an arrangement with their co-defendant Gordon by which he was to drive these logs down the Sturgeon river, still farther on the way to the mill. Gordon entered upon the work, took actual possession, and was in such possession when the injunction order was obtained. On these grounds, the plaintiff receiver must fail in his action.

If that conclusion is right, the contention of the plaintiffs that the question of the validity of the bank's securities and their priorities must be fought out as to these logs in the suit of *Diehl v. Carritt*, is answered.

Then the contention of the plaintiff liquidator is, that, even if the debenture-holders have no standing, the claim of the bank must be proved in liquidation proceedings in the winding-up of the plaintiff company.

No doubt, the bank has had, and will have, to deal with claims in the winding-up proceedings; but this claim, in reference to particular spruce and balsam logs which were cut and brought to McCarthy creek by the bank's advances, should be dealt with now and determined once for all in the present action. Any assistance the Court can give to the parties to have the

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questions determined with as little additional expense as possible should be given.

I am of the opinion that the defendants were right in defending this action and in continuing its defence, without leave, in order to have the right of the bank, under the securities mentioned, determined herein; but, should leave be necessary, I grant it *nunc pro tunc*, so far as I have power to do so.

See *In re David Lloyd & Co.* (1877), 6 Ch.D. 339; *In re Joshua Stubbs Limited*, [1891] 1 Ch. 187.

The fact of a winding-up order does not prevent a security-holder from bringing an action to realise his security: *In re Longendale Cotton Spinning Co.* (1878), 8 Ch. D. 150.

The logs in question were got out in the winter of 1905-6. I accepted the evidence of John Craig, and the extract from his evidence was written out. He stated that these logs were probably cut from August, 1905, to the end of March or the beginning of April, 1906; and he said that the advances made for getting these logs out were evidently correct, and included in three bills—he called them bills—February 23, April 6, April 7, all of 1906.

These bills could not have been given for anything else. No other bank than the Quebec Bank was getting securities on the logs during the season of 1905-6. The Quebec Bank was the only bank getting securities on logs in the bush, and the McCarthy creek logs in question here were the logs in the bush, got out that season with the money of the Quebec Bank.

Mr. Craig was evidently mistaken or there is an error in the copy of the note put in. The demand notes were: February 23, 1906, \$120,000; April 7, \$15,000; and, on the same date, April 7, \$30,000. There is no date of April 6, but the two mentioned, viz., Nos. 67 and 68, are both of the same date.

During 1905, the Quebec Bank was advancing large sums of money upon the promises, in writing, of the company that security would be given upon the logs cut and to be cut, and to be brought to the plaintiffs' mill.

The advance was to the extent of \$3 a cord—that was afterwards increased.

The correspondence is interesting as shewing the sublime faith of the bank in the mill.

Of the promises in writing are the letters of the 23rd August, 1905, and the 23rd February, 1906.

The letter of the 23rd August, in part, is a request for the advances, and a promise to give a warehouse or cove receipt, or other security under the Bank Act. The letter gives to the bank, so far as a letter can, the most ample power, in case of default in payment of the note, to take possession and sell, etc., etc.

On the 23rd February, 1906, the company wrote to the manager of the bank at Sturgeon Falls, giving a statement in part and an estimate of part of the logs cut and hauled, and on the same day the security was given on 40,000 cords of logs—and in the body of that security is written, “As promised in our letter of 23rd August, 1905;” and on the 23rd February the demand note for \$120,000 was given. Without referring in detail to the advances and to the notes and securities given, I have no difficulty in arriving at the conclusion that, for the identical spruce and balsam logs in question in this action, the money was advanced by the Quebec Bank, and these logs are in part the logs mentioned and intended to be mentioned in the securities given by the company to the bank, and the money was advanced by the bank because of the promises in writing that the securities would be given. See sec. 90 of the Bank Act.

In fine print on the blank forms of these securities, are the words: “For loans to owners in possession—Bank Act, sec. 74.” That section of 54 & 55 Viet. ch. 17 is the same as sec. 86 of ch. 29, R.S.C. 1906. I find that the securities held by the Quebec Bank upon these spruce and balsam logs are valid. The company has admitted all through, except in this action, that these logs were the Quebec Bank logs—and the company is not now in a position to dispute the validity of the bank’s claim. Upon all the facts in this case, the liquidator is in no better position than the company if not in liquidation: *Rolland v. La Caisse d’Economie Notre-Dame de Québec* (1895), 24 S.C.R. 405.

The objection that the description in the securities is insufficient, even if the plaintiffs are allowed to raise it, cannot prevail. Very little care was taken in making out these securities;

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they were prepared by the company and accepted by the bank without question or revision or suggestion.

The security for 40,000 cords of logs has in it the statement that it is given as promised in the letter of the 23rd August, 1905. By reference to the letter, the logs from which the pulpwood was to be obtained are mentioned. One security on the 7th April, 1906, is upon 1,000,000 pieces. The estimate is given of 15 pieces to the cord, making in round figures 66,000, and it mentions that, of the 66,000 cords, 61,000 cords are needed in former securities, leaving only 5,000 cords as specially applicable to this as a matter of book-keeping or accounting.

Applying the rules deduced by Falconbridge, in his book on Banking, pp. 188 and 189: (1) that the description need not be such that without other inquiry the property could be identified; (2) that it is not necessary that the property should be so described as to enable a person to distinguish the article without having recourse to extrinsic evidence; and (3) that the written descriptions are to be interpreted in the light of the facts known to and in the minds of the parties at the time; the description should be held sufficient.

Upon the evidence, I find against the plaintiffs upon the allegations as set out in the statement of claim, and I find in favour of the defendants upon their statement of defence. There is no evidence of any fraudulent intent on the part of the company in giving, or of the bank in taking, the securities mentioned.

I find that, even if the logs did not belong to the defendant bank, the bank, holding these as security, would be entitled to the reasonable costs of bringing the said logs down from McCarthy creek, and the bank would be entitled to a lien on such logs for salvage.

It was absolutely necessary, in order to get anything from these logs, that they be brought down at least to Sturgeon Falls, as the nearest place for sale and conversion of the same.

Even if the securities are not valid, the defendant bank is entitled to and should be paid the amount of Government dues upon the said logs, the bank having paid the same to the Province of Ontario, and the bank has been subrogated in the rights of



the Province in the said logs as to the amount so paid. The company was a consenting party to the payment of these dues by the bank, and it was fully understood by the said company and the bank that the logs were liable therefor.

The amount in the whole paid to the Province of Ontario by the bank was \$21,017.28. It did not clearly appear how much of this sum was applicable to these particular spruce and balsam logs.

As to the question of the necessity of hauling out the logs at Sturgeon Falls, the order of the 28th day of May, 1908, was properly made, upon the evidence before the learned Chief Justice; but the weight of evidence at the trial, in my opinion, was, that there was booming space on the river where the logs could have been kept; there was, however, the danger of some of the logs sinking, if kept too long in the water.

Judgment should be for the defendants, dismissing this action with costs.

I assess the damages to the defendant bank by reason of the injunction, at the amount of cost to them of hauling out the logs upon the bank, and cost and loss that naturally resulted from such hauling out. If the parties can agree, the proper amount may be, at once, inserted in the judgment. If the bank does not accept the cost of hauling out and occasioned thereby as the whole amount to which the said bank is entitled, the bank may have a reference, at its own risk as to costs, to the Master in Ordinary.

In case the bank desires a reference, it must elect within twenty days, and in that case the costs of the reference only will be reserved.

Such damages in accordance with the order herein made on the 28th May, 1908, are to be paid by the plaintiff company and receiver; and, as between the bondholders and receiver, such damages are to be a charge on the assets of the company in priority to the claims of the bondholders. If damages are fixed by me, and if the plaintiffs desire a reference, it may be had at their own risk; twenty days to elect.

The plaintiffs appealed from the judgment of BRITTON, J.

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April 30 and May 1, 1912. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, J.J.A.

A. W. *Anglin*, K.C., and J. H. *Moss*, K.C., for the plaintiffs. The question is one as to the possession and protection of certain logs known as the McCarthy creek logs. It is submitted that these logs were subject as a first charge to the mortgages under which the appellant Clarkson was appointed receiver, and any rights which the respondents may have acquired were subsequent to the rights under these mortgages. The main point in this connection is as to whether or not the logs in question are to be considered "logs on their way to the mill." The appellants submit that the natural construction of this exception would make it to refer to logs that were, at the time the mortgages were taken, "on their way to the mill," and not to such logs as might thereafter be on their way to the mill. The evidence shews that such was the intended construction of the exception, which, as a matter of fact, applied to logs that could not be made the subject of mortgage, as they had already been pledged: Norton on Deeds, p. 119, and cases there cited; *Bullen v. Denning* (1826), 5 B. & C. 842, 850; *Savill Brothers Limited v. Bethell*, [1902] 2 Ch. 523, 537; *South Eastern R.W. Co. v. Associated Portland Cement Manufacturers (1900) Limited*, [1910] 1 Ch. 12. The respondents' contention involves the introduction of the word "while" before "on their way to the mill," which is not required by the construction for which we contend. Apart from the question of title, if, as the appellants allege, the securities of the defendants are void, they are strangers, and have no right to maintain their claim. These securities were not made in accordance with the provisions of sec. 90 of the Bank Act, which requires that the precise amount of the debt to be secured should be stated in the antecedent promise: *Toronto Cream and Butter Co. v. Crown Bank* (1908), 16 O.L.R. 400, *per* MacLaren, J.A., at p. 412. They also referred to *Richardson v. Alpena* (1879), 40 Mich. 203; *In re Tewkesbury Gas Co.*, [1911] 2 Ch. 279, affirmed [1912] 1 Ch. 1.

F. E. *Hodgins*, K.C., and D. T. *Symons*, K.C., for the defendants, relied upon the facts found and the reasons given by the learned trial Judge. The evidence shews that this action was

begun under a mistaken idea of the facts, as the receiver had no possession of the logs either in fact or in law. The mortgages under which he claimed did not include the logs, and he could not legally take possession of them: *McGuin v. Fretts* (1887), 13 O.R. 699; *Dickey v. McCool* (1887), 14 A.R. 166; *Mones v. McCallum* (1897), 17 P.R. 398; Kerr on Receivers, 5th ed., p. 202, and cases there cited; also at pp. 158, 160, 175, 181, 219; *Crow v. Wood* (1850), 13 Beav. 271; *Evelyn v. Lewis* (1844), 3 Ha. 472. These cases shew that the receiver must have actual as well as constructive possession. The mortgages must be construed in the light of the circumstances of the parties when they were made. The exception, in its proper and ordinary meaning, implies a continuous operation, and should not be construed in a way that would limit it to logs, none of which were then in existence or on the way to the mill. The exception is wide enough to cover logs in transit at any time, and they are in transit when they are cut with the intent to send them to the mill. Any other construction would be absurd, and repugnant to ordinary business common sense. The respondents' securities are valid under the Bank Act, and give them the same rights that the owners would have to deal with the logs in the ordinary course of business: *In re Victoria Steamboats Limited*, [1897] 1 Ch. 158; *Cox Moore v. Peruvian Corporation Limited*, [1908] 1 Ch. 604; *In re Yorkshire Woolcombers Association Limited*, [1903] 2 Ch. 284. The plaintiff Clarkson is bound to elect whether he shall claim as receiver or liquidator: *Stroud v. Lawson*, [1898] 2 Q.B. 44. Reference was made to *Swan v. North British Australasian Co.* (1863), 32 L.J. Ex. 273; *Wilson v. Kelland*, [1910] 2 Ch. 306; *Rolland v. La Caisse d'Economie Notre-Dame de Québec*, 24 S.C.R. 405; *In re Rainy Lake Lumber Co.* (1888), 15 A.R. 749; *In re Marine Mansions Co.* (1867), L.R. 4 Eq. 601, 610; *Ayers v. South Australian Banking Co.* (1871), L.R. 3 P.C. 548; *National Telephone Co. v. Constables of St. Peter Port*, [1900] A.C. 317, 321. The view urged on behalf of the appellants, that there was no definite ascertainment of the bank's securities, is too narrow, and not justified by the authorities: Maclaren on Banks and Banking, 3rd ed., pp. 186, 187, and cases there cited; Falconbridge on Banking, pp. 146,

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178, 188-190, 197, 203. The *Toronto Cream and Butter Co.* case, *supra*, relied on by the appellants, is distinguishable, as there was no such evidence in that case as there is here that the promise was acted upon. As to the description of the goods, we rely upon the judgment of the trial Judge—as to the omission of the word “particular” in the schedule to sec. 88, see *Falconbridge op. cit.*, p. 188. They also referred to the following cases: *In re Valletort Sanitary Steam Laundry Co.*, [1903] 2 Ch. 654; *Brunton v. Electrical Engineering Corporation*, [1892] 1 Ch. 434; *Illingworth v. Houldsworth*, [1904] A.C. 355; *Edward Nelson & Co. v. Faber & Co.*, [1903] 2 K.B. 367; and (as to the respondents’ right to claim by way of salvage) *Clarke v. Sarnia Street R.W. Co.* (1877), 42 U.C.R. 39; *Athenæum Life Assurance Society v. Pooley* (1858) 3 De G. & J. 294.

*Anglin*, in reply. The descriptions of the goods must be such as will identify them, and distinguish them from others of the same kind, or of a different kind. The respondents can have no equity beyond what is shewn by the facts and documents in the case. As to the question of exception, he referred to *Farquharson v. Barnard Argue Roth Stearns Oil and Gas Co.* (1911), 25 O.L.R. 93. The *Rolland* case, *supra*, was only a matter of *ultra vires*, not as here; and, as in the case of *Bank of Toronto v. Perkins* (1883), 8 S.C.R. 603, a matter of absolute prohibition.

June 28. MACLAREN, J.A.:—The plaintiffs, the Imperial Paper Mills of Canada Limited and Clarkson, as receiver for the bondholders of the company and as liquidator of the company, appeal from the judgment of Britton, J., dismissing their action for an injunction and for the recovery of certain spruce and balsam logs which the Quebec Bank claimed under certain securities purporting to be executed by the company under sec. 88 of the Bank Act.

Counsel on both sides spent some time in the discussion of certain minor and technical points as to the effect of the winding-up order, the conduct and intentions of the parties, the constitution of the action, etc.; but these were not very strongly pressed, and may be properly passed over, and the contest decided upon the merits.



On the 6th October, 1898, and the 15th December, 1901, the Sturgeon Falls Pulp Company in consideration of the expenditure of large sums for the erection of pulp mills, the payment of Government dues, etc., acquired from the Provincial Government the exclusive right for twenty-one years to cut spruce and other timber on a large area of Crown lands. These rights were subsequently assigned to the plaintiff company on the 7th May, 1903.

On the 22nd September, 1903, this company executed a mortgage deed of trust in favour of the Trustees Executors and Securities Insurance Corporation, for £100,000, upon "the whole property, assets, rights, privileges, and undertaking of the company, present and future (excepting logs on the way to the mill)," to secure bonds of the company to that amount.

On the 18th November, 1903, it executed another debenture mortgage in favour of Messrs. Carritt and Sinclair for £200,000, "upon the whole property, assets, franchises, and undertakings of the company, present and future (excepting logs on the way to the mill)," to rank after the mortgage-deed of the 22nd September, 1903.

Counsel for the plaintiffs argued that the above exceptions applied only to logs on the way to the mill at the respective dates of the mortgages. I cannot accede to this argument, as I do not consider it the natural meaning of the document, and think it was properly construed by the trial Judge. The words are, in my opinion, used in their normal and natural sense. In each instance, they immediately follow the words "present and future;" and, if they were intended to have the restrictive meaning suggested, I think the phrase would have read "logs now on the way to the mill," or some equivalent expression would have been used. Besides, the whole tenor of the instruments shews that these mortgages were to be mere "floating securities," and that it was the general intention that the company, while meeting its obligations under these instruments, was to be allowed to carry on its business in the usual manner. It is common knowledge that the carrying on of such operations as the cutting of these logs in the bush, and drawing them to the banks of the streams in the winter, and floating them down the

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streams to the mills in the spring, necessitates very large expenditures within a very limited time during these seasons, and that the ordinary way of financing these is to secure advances from banks on the security of the logs, under the exceptional provisions of the Bank Act, which overrides the ordinary laws of the Provinces in this regard, in order to enable those carrying on these lumbering operations to raise such moneys as were obtained from the bank by this company on this very security. To my mind, there can be no doubt that this is what all the parties had in contemplation when the exception in question was inserted in these agreements.

It is not necessary for us to determine in this case precisely when these logs were on their way to the mill. It may be argued that, when they were severed from the land and became logs, the exception applied, and continued so long as the mill was their destination; but it is not necessary for the defendants to go so far. It is sufficient that the words of this exception properly applied to them when the bank made its advances and took the securities in question, and continued to be applicable up to the institution of the present action. Their being delayed on the way, either on account of the want of water to float them or for any other reason, did not alter their character or prevent them from coming within the terms of the exception.

The appellants further contend that the securities of the bank are invalid on account of the requirements of the Bank Act not having been complied with. The transactions in question were prior to the coming into force of the Revised Statutes; but, as the trial Judge and the parties have referred to the various sections by the numbers they now bear, it will be convenient to continue this method, as no changes have been made in the sections themselves.

By sec. 76 of the Act, it is enacted: "2. Except as authorised by this Act, the bank shall not, either directly or indirectly,—  
. . . (c) lend money or makes advances . . . upon the security of any goods, wares and merchandise." One of the exceptions is found in sec. 88, which provides: "3. The bank may lend money to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise, upon

the security of the goods, wares and merchandise manufactured by him, or procured for such manufacture." The security is to be in the form set forth in schedule C, or to the like effect; and the bank is to acquire the same rights and powers in respect to the goods, etc., covered thereby, as if it had acquired them by virtue of a warehouse receipt.

Section 90 provides that the bank shall not acquire or hold any such security to secure the payment of any bill, note, debt, or liability, unless such bill, note, etc., is negotiated or contracted —(a) at the time of the acquisition thereof by the bank; or (b) upon the written promise or agreement that such security would be given to the bank.

Counsel for the appellants contended before us that the letters of the company promising that such securities would be given were not sufficiently precise and definite to meet the requirements of the Act. Most of the cases that have been before our Courts have been under the Act of 1871, where the word used was "understanding," or under the Act of 1886, where the word used was simply "promise." The present language, "written promise or agreement," was introduced in 1890, but, so far, does not appear to have been judicially construed. See *Royal Canadian Bank v. Ross* (1877), 40 U.C.R. 466; *McCrae v. Molsons Bank* (1878), 25 Gr. 519; *Re Central Bank* (1891), 21 O.R. 515; *Suter v. Merchants Bank* (1876), 24 Gr. 365; and *Tenant v. Union Bank* (1892), 19 A.R. 1, where a liberal construction was given to the language.

The language of the Act is very similar to the corresponding provision regarding chattel mortgages in this Province, which has long been in force, and is now to be found in 10 Edw. VII. ch. 65, sec. 16, which provides that "every covenant, promise or agreement to make, execute or give a mortgage of goods and chattels shall be in writing," and has often been construed by our Courts. See *Allan v. Clarkson* (1870), 17 Gr. 570; *McRoberts v. Steinoff* (1886), 11 O.R. 369; *Clarkson v. Sterling* (1888), 15 A.R. 234; *Embury v. West* (1888), 15 A.R. 357; *Lawson v. McGeoch* (1893), 20 A.R. 464. In none of these was a critical or strict construction of the language favoured. In the last-named case, Maclellan, J.A., at p. 475, says: "It is said

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that the agreement was too vague and uncertain to be attended to, as it is not shewn that any particular goods were mentioned, which were to be mortgaged. I am not pressed with this objection. The debtor was a farmer, and the mortgage was to be a chattel mortgage. I think that means a mortgage of the debtor's chattels; and that the defendant could have selected a sufficient quantity of the debtor's goods and have required a mortgage upon them." See also the language of Proudfoot, V.-C., in *Suter v. Merchants Bank*, *supra*, at p. 374 *et seq.*, to the same effect.

I do not think that such commercial documents as these should be scrutinised with the same particularity as those expected to be prepared and examined by solicitors, and only executed after having been carefully settled. The goods were sufficiently marked, and could be readily identified, as found by the trial Judge; and the officers and servants of the company appear to have spoken of them as the logs of the bank.

All the logs in question appear to be fully covered by the securities in the form prescribed by the Bank Act and given contemporaneously with the contraction of the debt and the negotiation of the promissory notes of the company to which they are respectively annexed.

In addition to this, as pointed out by the trial Judge, the bank has paid to the Ontario Government large sums due by the company for the logs cut by them, and has been subrogated in the rights of the Government with respect to the same, and would have a lien in the nature of salvage for the moneys advanced to float the logs from McCarthy creek to Sturgeon Falls.

I am of opinion that the appeal should be dismissed.

MEREDITH, J.A.:—The real question in this action is, which of the parties is entitled to the proceeds of the logs in question?

Originally they were the property of the paper company, being cut by them under a lease from the Province.

The defendants claim title under certain charges made upon the property by the company in their favour.

The reply is, that the charges are invalid in law; and that, if not, they are subsequent to charges in favour of the bond-



holders, who are represented in this action by their receiver, the plaintiff Clarkson.

The first question for consideration is, therefore, whether the charges in favour of the defendant the bank are invalid because not made in accordance with the provisions of the Bank Act, sec. 90. But, in all things substantial, they seem to me to have been so made. They were made under and in accordance with the antecedent agreements, in writing, to give such security—one of them expressly so. The contention that the precise amount of the debt to be secured must be stated in the antecedent promise in writing is not well-founded; the enactment does not require it; nor does the case of *Toronto Cream and Butter Co. v. Crown Bank*, 16 O.L.R. 400, 419, give reasonable encouragement to the contention. In that case the security was not shewn to have been given upon a previous promise to give it. The promise in this case was of security for the amounts to be advanced to enable the company to get out a quantity of pulpwood logs estimated at 15,000 cords in the first transaction, and in like manner as to the other transactions; a promise which, in my opinion, comes within the provisions of sec. 90. Nor are the securities invalid for want of compliance with the provisions of the Act in regard to the description of the goods. I see no reason why a certain number or quantity of pulpwood logs, out of a greater quantity, may not be so charged without severance, just as, I think, would be the case in regard to wheat and other things in which all parts are alike, and so greater certainty is not required for any purpose, so far as any one affected, or who might be affected, is substantially concerned. No creditor, or subsequent transferee of the property, would be a whit better off if each particular log had been ear-marked.

Then are the logs in question excepted from the general security given in favour of bondholders? The exception, as expressed in the first mortgage, is in these words, "logs on the way to the mill," the mortgage being a "floating security" covering everything presently owned as well as to be acquired by the mortgagors. It is said that the exception does not apply to the future, that it must be confined to logs then on the way to the mill; but I am quite unable to agree in that contention; indeed,

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it seems to me to be quite plain that such was not the intention of the parties; and that neither strict grammatical construction, nor ordinary understanding, of such words, favours it. The business was to be carried on; that is fully provided for in the mortgages; it could not be carried on without pulpwood; pulpwood could not be obtained without payment of transportation charges, charges which are, in the case of common carriers, a lien upon the goods carried; pulpwood would be needed in future years quite as much as at the time when the mortgages were given. I cannot think that among business men any one would have thought of raising such a contention.

There was power, therefore, to charge logs on the way to the mill; but the further contention is made that the logs in question were not on their way to the mill when the defendants took possession of them; but, again, I am quite unable to see anything in the point. From the time the logs were cut in the forest until they reached the mill, they were on their way to the mill; the purpose of cutting them was, that they should go to the mill and there be converted into paper-pulp. Every step taken towards that destination was a step on the way to the mill, whenever taken; it was part of the necessary transportation.

It was suggested that the later mortgage might be wider in its scope than the earlier; but the contrary is so; there is in it the words "excepting logs on the way to the mill," and, in addition, the plainest liberty to mortgage or charge for the purpose of carrying on the business; the subsequent covenant, not to mortgage or charge without the consent of the bondholders, does not affect the preceding exception or liberty; it comprises mortgages and charges for other purposes.

Needless technical obstruction ought not to be put in the way of honest mercantile transactions such as those here in question. Such enactments as that in question are best interpreted when given the meaning which business-men generally would attach to them.

MOSS, C.J.O., and GARROW and MAGEE, JJ.A., concurred.

*Appeal dismissed.*

## APPENDIX.

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Cases reported in the Ontario Law Reports and Ontario Weekly Notes decided on appeal to the Supreme Court of Canada, reported since the publication of volume 25, Ontario Law Reports:—

HENDERSON ROLLER BEARINGS LIMITED, RE, 24 O.L.R. 356, affirmed by the Supreme Court of Canada: MARTIN V. FOWLER, 46 S.C.R. 119.

NATIONAL TRUST CO. V. MILLER, 2 O.W.N. 993, reversed by the Supreme Court of Canada: NATIONAL TRUST CO. LIMITED V. MILLER, SCHMIDT V. MILLER, 46 S.C.R. 45.





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## ASSIGNMENT OF BUILDING CONTRACTS.

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## ATTACHMENT OF DEBTS.

*Money Deposited in Bank at Branch out of Ontario—Residence of Garnishees—Service of Attaching Order—Locality of Debt—Subrogation of Judgment Creditor to Rights of Debtor—Con. Rules 162, 911 et seq.—Extra-territorial Recognition of Judgment—Residence of Debtor.]—Under Con. Rules 911 et seq., a debt may be attached to answer a judgment, (a) if the garnishee is within Ontario, or (b) if the garnishee is out of Ontario, and the case would fall within one or more of the clauses of Con. Rule 162 (as to service of original process out of Ontario) if the judgment debtor was himself seeking to assert his rights within Ontario.—The money attached was deposited by the debtor in a branch in the Province of Alberta of a bank having its head office in Ontario. The attaching order was served on the bank at the head office, and reached the branch in Alberta before any*

demand by the debtor:—*Held*, that the order should be made absolute.—*The King v. Lovitt*, [1912] A.C. 212, distinguished upon the ground that the Rules as to attachment of debts are not based upon the locality of the debts.—The question whether the judgment of an Ontario Court would be accorded recognition in a foreign country is not one to be considered by the Court.—Judgment of FINKLE, Co. C.J., Oxford, upon the trial of a garnishee issue, reversed. *McMulkin v. Traders Bank of Canada*, 1.

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*Advances by Bank to Paper Company—Security on Pulpwood Logs—Antecedent Written Promise—Validity—Bank Act, sec. 90—Proceeds of Logs—Claim of Debenture Mortgagees—Floating Security—Exception—“Logs on the Way to the Mill”—Description—Identification.*—The plaintiff company, having the right to cut spruce and other timber upon a large area of Crown lands, in September, 1903, executed a mortgage deed of trust in favour of a trust company, for £100,000, upon “the whole property, assets, rights, privileges, and undertaking of the company, present and future (excepting “logs on the way to the mill),” to secure bonds of the plaintiff company to that amount; and in November, 1903,

executed a similar debenture mortgage, with an exception in the same words, for £200,000, in favour of C. and S.:—*Held*, that the exceptions did not apply only to “logs on the way to the mill” at the respective dates of the mortgages, but covered logs on the security of which the defendant bank from time to time made advances to enable the plaintiff company to carry on its business of manufacturing paper. The debenture mortgages were to be “floating securities,” and the plaintiff company was to be allowed to carry on its business in the usual manner. From the time the logs were cut in the forest until they reached the mill, they were on their way to the mill.—The advances were made by the bank in accordance with antecedent agreements, in writing, to give security upon the logs. The promise in the first transaction was of security for the amounts to be advanced to enable the company to get out a quantity of pulpwood logs estimated at 15,000 cords, and so in the subsequent transactions:—*Held*, that there had been a substantial compliance with sec. 90 of the Bank Act, R.S.C. 1906, ch. 29: it was not necessary that the precise amount of the debt to be secured should be stated in the antecedent promise in writing; nor were the securities invalid for want of compliance with the provisions of the Act in regard to the description of the goods; the goods were sufficiently marked and could be readily identified.—*Held*, therefore, that the bank was entitled to the proceeds of the logs, as against the liquidator of the company and the debenture mortgagees.—Judgment of BRITTON, J., af-

firmed. *Imperial Paper Mills of Canada Limited v. Quebec Bank*, 637.

2. *Securities Taken by Bank under sec. 90 of Bank Act—Securities upon Sawn Lumber—Wholesale Dealer*—"Products of the Forest"—"And the Products thereof"—*Bank Act, sec. 88 (1)—Assignment for Benefit of Creditors—Securities Given within Sixty Days—Continuation of Former Securities—Assignment of Building Contracts—Lumber Used in Building—Assignment of Book-debts.*]—The words "and the products thereof," in sub-sec. 2 of sec. 74 of the Bank Act, 53 Vict. ch. 31 (now, with some immaterial changes, sub-sec. 1 of sec. 88 of R.S.C. 1906, ch. 29), apply to all the articles previously mentioned in the subsection, and, therefore, apply to the products of the forest.—*Dic-tum* of Hall, J., in *Molsons Bank v. Beaudry* (1901), Q.R. 11 K.B. 212, approved.—*Semble*, that sawn lumber is a product of the forest, within the meaning of the sub-section.—*Held*, upon the evidence, that B. was a wholesale dealer in lumber, and, therefore, a person from whom securities upon lumber could lawfully be taken by the bank, under the sub-section.—*Held*, also, upon the evidence, that, although the security under which the bank claimed was given less than sixty days before the making of an assignment by B. to the plaintiff for the benefit of his creditors, it was a continuation of a former security of the like character held by the bank for the indebtedness, and was entitled to prevail against the assignment.—*Held*, also, that doors and window sashes and the like, manufactured

from lumber upon which the bank held security, were products of the lumber covered by the securities. Some of the lumber covered by the securities was used by B. in the erection of buildings:—*Held*, that, so far as the money payable under the building contracts assigned to the bank represented the lumber so used, the bank were entitled to it.—*Held*, also, that the bank's claim to book-debts assigned by B. could not prevail against the assignment to the plaintiff. *Townsend v. Northern Crown Bank*, 291.

See ATTACHMENT OF DEBTS —  
INFANT, 1—PROMISSORY NOTES.

### BENEFIT CERTIFICATE.

See INSURANCE, 4, 5.

### BETTING-HOUSE.

See CRIMINAL LAW, 3.

### BILLS AND NOTES.

See INFANT, 1—PROMISSORY NOTES.

### BILLS OF EXCHANGE ACT.

See INFANT, 1.

### BILLS OF SALE.

See COMPANY, 2.

### BILLS OF SALE AND CHATTEL MORTGAGE ACT.

See COMPANY, 2, 5.

### BOOK-DEBTS.

See BANKS AND BANKING, 2—COMPANY, 5.

### BOUNDARY.

See HIGHWAY.

### BUILDING CONTRACT.

See BANKS AND BANKING, 2.

**BUILDINGS.**

See MUNICIPAL CORPORATIONS,  
1.

**BY-LAWS.**

See MUNICIPAL CORPORATIONS.

**CARRIERS.**

See RAILWAY, 1.

**CASES.**

*Aas v. Benham*, [1891] 2 Ch. 244, 255, distinguished.]—See PARTNERSHIP.

*Atwood v. Atwood* (1893-4), 15 P.R. 425, 16 P.R. 50, considered.]—See HUSBAND AND WIFE, 1.

*Atwood v. Crowdie* (1816), 1 Stark. 483, explained and followed.]—See PROMISSORY NOTES.

*Ball v. Parker* (1876), 39 U.C. R. 488, followed.]—See HUSBAND AND WIFE, 2.

*Benor v. Canadian Mail Order Co.* (1907), 10 O.W.R. 1091, distinguished.]—See COMPANY, 4.

*Bibby v. Davis* (1902), 1 O.W. R. 189, not followed.]—See PUBLIC HEALTH ACT.

*Bicknell v. Grand Trunk R.W. Co.* (1899), 26 A.R. 431, distinguished.]—See RAILWAY, 1.

*Birney v. Toronto Milk Co.* (1902), 5 O.L.R. 1, explained and followed.]—See COMPANY, 4.

*Boulton v. Burke* (1885), 9 O. R. 80, followed.]—See HUSBAND AND WIFE, 2.

*Brady v. Sadler* (1890), 17 A.R. 365, followed.]—See WATER AND WATERCOURSES.

*Brice v. Munro* (1885), 12 A.R. 453, followed.]—See COMPANY, 1.

*Brunswick, Duke of, v. Harmer* (1849), 14 Q.B. 185, followed.]—See SLANDER.

*Burchell v. Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614, distinguished.]—See PRINCIPAL AND AGENT, 1.

*Burland v. Earle*, [1902] A.C. 83, 101, followed.]—See COMPANY, 4.

*Burrell, In re, Burrell v. Smith* (1869), L.R. 7 Eq. 399, applied and followed.]—See MORTGAGE, 1.

*Canadian Camera and Optical Co., Re* (1901), 2 O.L.R. 677, explained and discussed.]—See COMPANY, 2.

Followed.]—See COMPANY, 5.

*Carne v. Long* (1860), 2 DeG. F. & J. 75, applied and followed.]—See WILL, 2.

*Carpenter v. Canadian Railway Accident Insurance Co.* (1909), 18 O.L.R. 388, followed.]—See INSURANCE, 2.

*Clark v. Loftus* (1911), 24 O.L. R. 174, reversed.]—See INSURANCE, 5.

*Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147, specially referred to.]—See MINES AND MINERALS.

*Cornwall Furniture Co., Re* (1910), 20 O.L.R. 520, followed.]—See COMPANY, 3.

*Davis, Re* (1909), 18 O.L.R. 384, distinguished.]—See INFANT, 2.

Followed.]—See INSURANCE, 4.

*Denton, Re* (1912), 25 O.L.R. 505, reversed.]—See WILL, 3.

*Dryden v. Smith* (1897), 17 P. R. 500, explained and distinguished.]—See DISCOVERY.

*Dumphy v. Kehoe* (1891), 21 Rev. Leg. 119, approved and followed.]—See CONTRACT, 2.

*Etherington and Lancashire and Yorkshire Accident Insurance Co.,*



*In re*, [1909] 1 K.B. 591, followed.]  
See INSURANCE, 2.

*Fitzroy, Township of, v. County of Carleton* (1905), 19 O.L.R. 686, specially referred to.]—See HIGHWAY.

*Fraser, Re* (1911), 24 O.L.R. 222, reversed.]—See LUNATIC.

*Fulton v. Andrew* (1875), L.R. 7 H.L. 448, explained.]—See INSURANCE, 5.

*Gilbey v. Great Western R.W. Co.* (1910), 102 L.T.R. 202, specially referred to.]—See INSURANCE, 2.

*Gillie v. Young* (1901), 1 O.L.R. 368, followed.]—See INSURANCE, 4.

*Goldstein v. Canadian Pacific R.W. Co.* (1911), 23 O.L.R. 536, 542, 543, not followed.]—See RAILWAY, 1.

*Grills v. Farah* (1910), 21 O.L.R. 457, distinguished.]—See COMPANY, 1.

*Hall v. Severne* (1839), 9 Sim. 515, followed.]—See WILL, 1.

*Henwood v. Overend* (1815), 1 Mer. 23, followed.]—See WILL, 1.

*Holroyd v. Marshall* (1862), 10 H.L.C. 191, 9 Jur. N.S. 213, applied and followed.]—See COMPANY, 2.

*Hutchinson, Re* (1912), 26 O.L.R. 113, not followed.]—See INSURANCE, 4.

Reversed.]—See INFANT, 2.

*Jenkins v. Wilcock* (1862), 11 C.P. 505, followed.]—See COMPANY, 1.

*Johnston v. Wade* (1908), 17 O.L.R. 372, distinguished.]—See COMPANY, 5.

*Jordan v. Provincial Provident Institution* (1898), 28 S.C.R. 554, followed.]—See INSURANCE, 2.

*Lee v. Arthur* (1908), 100 L.T.R. 61, applied and followed.]—See PRACTICE.

*Lewis, Re* (1885), 11 P.R. 107, approved and followed.]—See TRIAL.

*Locators v. Clough* (1908), 17 Man. L.R. 659, disapproved.]—See PRINCIPAL AND AGENT, 2.

*Lundy v. Lundy* (1895), 24 S.C.R. 650, specially referred to.]—See MINES AND MINERALS.

*McKinnon v. Lundy* (1893-4), 24 O.R. 132, 21 A.R. 560, specially referred to.]—See MINES AND MINERALS.

*Maybury v. O'Brien* (1912), 25 O.L.R. 229, reversed.]—See VENDOR AND PURCHASER, 1.

*Merchants Bank of Canada v. Thompson* (1911), 23 O.L.R. 502, reversed.]—See PROMISSORY NOTES.

*Molsons Bank v. Beaudry* (1901), Q.R. 11 K.B. 212, approved.]—See BANKS AND BANKING, 2.

*Moore v. Kirkland* (1856), 5 C.P. 452, followed.]—See COMPANY, 1.

*Morlock and Cline Limited, Re, Sarvis and Canning's Claims* (1911), 23 O.L.R. 165, distinguished.]—See COMPANY, 4.

*Nobel's Explosives Co. v. Jones* (1881), 17 Ch.D. 721, 739, referred to.]—See INSURANCE, 5.

*Ooregum Gold Mining Co. of India v. Roper*, [1892] A.C. 125, specially referred to.]—See COMPANY, 3.

*Orangeville Local Option By-Law, Re* (1910), 20 O.L.R. 476, specially considered.]—See MUNICIPAL CORPORATIONS, 2.

*Palmer v. Hendrie* (1860), 28 Beav. 341, distinguished.]—See MORTGAGE, 1.

*Pattison v. Canadian Pacific R. W. Co.* (1911), 24 O.L.R. 482, reversed.]—See RAILWAY, 2.

*Perth Flax and Cordage Co., Re* (1909), 13 O.W.R. 1140, specially referred to.]—See COMPANY, 5.

*Pirie v. Wyld* (1886), 11 O.R. 422, followed.]—See CONTRACT, 1.

*Queen City Plate Glass Co., Re, Eastmure's Case* (1910), 1 O.W. N. 863, distinguished.]—See COMPANY, 4.

*Regina v. Boyd* (1896), Q.R. 5 Q.B. 1, referred to.]—See CRIMINAL LAW, 2.

*Regina ex rel. Clancy v. Conway* (1881), 46 U.C.R. 85, followed.]—See MUNICIPAL ELECTIONS.

*Rex v. Komienksy* (1903), 6 Can. Crim. Cas. 524, approved.]—See CRIMINAL LAW, 4.

*Rex v. Lovitt*, [1912] A.C. 212, distinguished.]—See ATTACHMENT OF DEBTS.

*Rex v. Thompson* (1908), 17 Man. L.R. 608, approved.]—See CRIMINAL LAW, 4.

*Rex v. Wener* (1903), 6 Can. Crim. Cas. 406, approved.]—See CRIMINAL LAW, 4.

*Rickard v. Robson* (1862), 31 Beav. 244, applied and followed.]—See WILL, 2.

*Robinson v. Canadian Pacific R. W. Co.* (1911), 23 O.L.R. 536, 542, 543, not followed.]—See RAILWAY, 1.

*Ross v. Township of London* (1910-11), 20 O.L.R. 578, 23 O. L.R. 74, followed.]—See PUBLIC HEALTH ACT.

*Saltfleet, In re Local Option By-Law of the Township of* (1908), 16 O.L.R. 293, specially considered.]—See MUNICIPAL CORPORATIONS, 2.

*Sellars v. Village of Dutton*

(1904), 7 O.L.R. 646, followed.]—See PUBLIC HEALTH ACT.

*South Essex Estuary and Reclamation Co., In re* (1869), L.R. 4 Ch. 215, explained and discussed.]—See COMPANY, 2.

*Standard Trading Co. v. Seybold* (1902), 1 O.W.R. 650, explained and distinguished.]—See DISCOVERY.

*Stratton v. Vachon* (1911), 44 S.C.R. 395, distinguished.]—See PRINCIPAL AND AGENT, 1.

*Sutherland v. Grand Trunk R. W. Co.* (1909), 18 O.L.R. 139, distinguished.]—See RAILWAY, 1.

*Templer, Ex p.* (1847), 2 Saund. & C. 169, followed.]—See INFANT, 2.

*Thibaudeau v. Paul* (1894), 26 O.R. 385, specially referred to.]—See COMPANY, 5.

*Thomson v. Playfair* (1911), 25 O.L.R. 365, affirmed.]—See CONTRACT, 3.

*Thomson v. Shakespear* (1860), 1 DeG. F. & J. 399, applied and followed.]—See WILL, 2.

*Venner v. Sun Life Insurance Co.* (1890), 17 S.C.R. 394, followed.]—See INSURANCE, 2.

*Wallace v. Employers' Liability Assurance Corporation* (1911), 25 O.L.R. 80, varied.]—See INSURANCE, 3.

*Wentworth, County of, v. Township of West Flamborough* (1911), 23 O.L.R. 583, affirmed.]—See HIGHWAY.

*Westbrook v. Australian Royal Mail Steam Navigation Co.* (1853), 23 L.J.N.S.C.P. 42, applied and followed.]—See PRACTICE.

*West Lorne Scrutiny, Re* (1911), 25 O.L.R. 267, reversed.]—See MUNICIPAL CORPORATIONS, 2.

*Wilkinson v. Alston* (1879), 48 L.J.Q.B. 733, applied and fol-

lowed.]—See **PRINCIPAL AND AGENT**, 2.

*Williams v. Township of Raleigh* (1890), 14 P.R. 50, applied and followed.]—See **PRACTICE**.

*Wyatt v. Attorney-General of Quebec*, [1911] A.C. 489, applied and followed.]—See **WATER AND WATERCOURSES**.

*Yeap Cheah Neo v. Ong Cheng Neo* (1875), L.R. 6 P.C. 381, applied and followed.] — See **WILL**, 2.

### **CHARGE ON LAND.**

See **MORTGAGE—WILL**, 2.

### **CHARITY.**

See **WILL**, 4.

### **CHEQUE.**

See **INFANT**, 1.

### **CHURCH.**

*Property Rights—Religious Institutions Act*, 36 Vict. ch. 135, sec. 7, 19—*Construction—Deed of Conveyance of Church Site to Trustees—Special Trusts not Affected by Statute—Erection of Meeting-house—Subsequent Abandonment—Removal to New Building—Effect as to Continuity of Beneficiary—Sale of Old Site and Building—Resolutions of Congregation—Breach of Trust—Status of Plaintiffs to Complain—Former Members of Congregation—Status of Minister of New Congregation—“Duly Authorized”—Congregational System of Church Government—Class Action—Amendment—Remedy for Breaches of Trust.*]—In 1874, a congregation of the Evangelical Lutheran denomination purchased land in the town of Stratford as a site for a house of public worship, and the land

was conveyed to trustees for the congregation. The recitals in the conveyance shewed that it was obtained under the powers conferred upon religious societies by the Act then in force respecting the property of religious institutions, 36 Vict. ch. 135 (O.), which provides (sec. 19, now sec. 23 of R.S.O. 1897, ch. 307) that “in every case the ‘special trusts or powers of trustees contained in any . . . conveyance . . . shall not be affected or varied by any of the provisions of this Act.’” Section 7 of the Act gives power to sell the land when it becomes unnecessary to be held for the religious use of the congregation, and it is deemed advantageous to sell. The recitals shewed also that a then existing religious society or congregation of Evangelical Lutherans had occasion for the land purchased and conveyed as a site for a house of public worship, and had appointed three persons (the trustees to whom the conveyance was made) to hold in perpetual succession, under the name of “The Trustees of the Stratford Evangelical Lutheran Church,” for the use of the said society and upon the trusts thereafter set forth. There were two special trusts: first, that the premises should be forever thereafter held for the use of the members of an Evangelical Lutheran Church; and, second, “that the trustees shall at all times hereafter permit any minister, he being duly authorised by the said Evangelical Lutheran Church to conduct the worship thereof, to officiate in the church existing or which may hereafter be built on the said lot according to the ritual . . . of the said church, and shall also apply the rents and profits derived



from any portion of the said lot or the buildings erected thereon towards the maintenance of public worship in the said church or meeting-house, according to the rules . . . or towards the repairs or improvement of the said property, and to no other purpose whatsoever." The conveyance also provided that when the church for which the "trust was created shall lose its visibility and cease to exist," the control of the property should pass over to and vest in the nearest Evangelical Lutheran Church of the same faith and order. The original society built and took possession of a meeting-house on the land so conveyed, and occupied the place for religious uses until December, 1908; when the congregation moved into a new building upon another site, it having been previously resolved (practically unanimously) by the congregation, at meetings held for the purpose, that a new lot should be bought and a new building put up, and that the old lot and building should be sold. After vacating the old site, the trustees, acting on the direction of the congregation, rented the old building, and applied the surplus of rent, after paying taxes and insurance, for the benefit of the congregation and of the new site. The trustees also, in like manner, sold four feet of the land, and were offering the rest for sale. In February, 1911, the plaintiffs and others began a movement for the establishment of a new congregation of Evangelical Lutherans in Stratford. One of the plaintiffs was a dissident member of the original society, the only one who had objected to the purchase of the new site and the sale of the old;

and another (the plaintiff H.) was a minister of the denomination in good standing, who had been called to Stratford for the purpose of organising the new movement. He became the pastor of a new society, worshipping in a hall; and this newly organised body, containing a few members of the original society, applied for leave to enter upon the old site; and, that being refused, in February, 1912, brought this action against the trustees of the new site and building (the successors of the original grantees), claiming and practically admitted to be the legal owners of the old site, for a mandatory order upon the defendants to enforce the re-opening of the old building for public worship, and to allow the plaintiff H. to conduct public worship therein, and for a declaration to have the trusts of the deed carried into execution, and to have the sale stayed and the rents applied under the trust to the old site:—*Held*, that the situation, provided for in the deed, of the church for which the trust was created losing its vitality and ceasing to exist, had not arisen: the vacating of the old site was not equivalent to the cesser of existence of the beneficiary.—*Held*, also, that the effect of sec. 19 of the Act (now sec. 23) is to forbid the nullification of the special trusts of the deed; and, by the terms of the deed, the land was acquired for the possessory use and benefit of the congregation, and was to be maintained and improved in perpetuity; the trust inhered in the title, and so passed to the successive trustees indefinitely *in futuro*—not to be interrupted by a sale out and out.—*Held*, however, that, as the



organisation of the church described in the deed was upon the Independent or Congregational system, the view of the majority prevailed; the organised body had power to change the place at which its services should be conducted and to change its name; the resolutions to vacate the old site and to sell or rent it were matters of congregational competence, and were conclusive as against the plaintiffs. The identity of the beneficiary church was established in favour of the body represented by the defendants; and such of the plaintiffs and those whom they represented as were members of the original body, had, by leaving it, ceased to be a part of it, and had no right as former members to claim any part of the trust property.—*Held*, also, that the plaintiff H., although in good standing as a minister of the general body, was not one “duly authorised by the said Evangelical Lutheran Church to conduct the worship thereof.” the context shewed that the source of authority was to be sought, not in the denomination at large, but in the particular body or church representing the original congregation.—*Held*, also, that no amendment enabling the plaintiffs to sue on behalf of others who sympathised with them—which was essential in order that no incongruity in the class represented might arise—would better the cause of action; the legal title was in the defendants, and no breach of trust had arisen in regard to which the plaintiffs had a right or an interest to complain.—*Semble*, that the defendants’ breaches of trust might be investigated by the intervention of the Attorney-General and a

competent relator *Huegli v. Pauli*, 94.

### CLASS ACTION.

See CHURCH.

### COERCION.

See CONTRACT, 2.

### COLLATERAL SECURITY.

See PROMISSORY NOTES.

### COMMISSION.

See PRINCIPAL AND AGENT.

### COMMON BETTING HOUSE.

See CRIMINAL LAW, 3.

### COMPANY.

1. *Liability of Directors for Wages of Servants—Action under Ontario Companies Act, sec. 94—Execution against Company—Return by Sheriff—Statutory Requirements—Return Made after Winding-up Order—“Proceeding” against Company—Dominion Winding-up Act, sec. 22—Proof of Status of Defendants as Directors—Travelling Expenses of Servants—Costs of Second Writ of Execution.*—The plaintiffs, who were servants of a mining company, recovered judgment against the company for wages, and placed writs of execution in the hands of the Sheriffs of two counties, that wherein the company’s head office was situated, and that wherein the company’s operations were carried on. After this, an order was made for the winding-up of the company under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, and after that order the Sheriffs made returns of the writs *nulla bona*; and thereupon the plaintiffs brought these actions against the

directors of the company under sec. 94 of the Ontario Companies Act, 7 Edw. VII. ch. 34:—*Held*, that to comply with this section it was sufficient that the execution should be placed in the hands of the Sheriff of the county in which the head office of the company was situated; and, upon the facts, the return to the execution so issued was not a mere colourable and illusory return, but a return after due diligence to realise the amount out of the effects of the company.—*Brice v. Munro* (1885), 12 A.R. 453, *Jenkins v. Wilcock* (1862), 11 C.P. 505, and *Moore v. Kirkland* (1856), 5 C.P. 452, followed.—*Grills v. Farah* (1910), 21 O.L.R. 457, distinguished.—2. That sec. 22 of the Winding-up Act, R.S.C. 1906, ch. 144, providing that, “after the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company,” did not prevent the making of the return after the winding-up order.—3. That the plaintiffs had given sufficient proof that the defendants were directors of the company.—4. That an allowance for travelling expenses is within the terms of sec. 94.—5. That the plaintiffs were not entitled to recover against the defendants the costs of the second writs of execution.—Judgment of DENTON, Co. C.J., affirmed. *Pukulski v. Jardine, Perryman v. Jardine*, 323.

2. *Winding - up — Claim of Liquidator to Ownership of Vessel in Course of Construction by Insolvent Company — Contract — Construction — Payment—Transfer of Ownership—Bills of Sale and Chattel Mortgage Act—Status*

*of Liquidator to Invoke—“Creditor”—Bills of Sale — Order of Reference—Powers of Referee.*—The above-named company made an agreement with a navigation company to build a steamer for the navigation company for \$297,000. Payments were to be made every two months to the extent of 80 per cent. of the work done and material purchased by and delivered to the contractor for constructing the steamer—balance on completion—the contractor to provide all manner of labour, material, and apparatus. After the first payment, as the work went on, it was provided, “the property in the said steamer so far as constructed, and in all machinery belonging thereto and in all materials purchased and intended to be used for constructing the same or any part thereof, shall become vested in and be the absolute property of the owner” — *i.e.*, the navigation company—“and the contractor shall and will then or at any time thereafter, at the request of the owner, execute and deliver to the owner such bill of sale or other assurance as the owner may be advised to be necessary to so vest said steamer and machinery and material in the owner, subject to the lien of the contractor upon the said steamer and its machinery and equipment for any unpaid balance . . . and subject to the possession of the said steamer remaining in and with the contractor until the owner is entitled to delivery in accordance with the provisions of this contract.” The agreement was made on the 18th February, 1907; the steamer was to be built by the 1st October, 1907. The navigation company paid \$30,000 on account of the work done,

materials furnished, etc.; and on the 4th November, 1907, the shipbuilding company made a bill of sale to the navigation company covering what had been done, and on the 27th November, 1907, another bill of sale. In January, 1908, an order was made for the winding-up of the shipbuilding company. The liquidator claimed the ownership of the work, alleging that the bills of sale were invalid as against him:—*Held*, that the provision above-quoted operated in equity as a transfer of ownership, from the time of the first payment, of all the ship and materials, etc., without the execution of a bill of sale. — *Holroyd v. Marshall* (1862), 10 H.L.C. 191, 9 Jur. N.S. 213, applied and followed.—2. That the liquidator, not being a creditor or a purchaser for valuable consideration, could not take advantage of the provisions of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1897, ch. 148, and other like statutes. Section 38 of that Act does not extend the meaning of “creditors” to liquidators.—*In re South Essex Estuary and Reclamation Co.* (1869), L.R. 4 Ch. 215, and *Re Canadian Camera and Optical Co.* (1901), 2 O.L.R. 677, explained and discussed.—3. That the Referee in the winding-up proceedings had the power, having regard to the terms of an order of reference set out in the report, to consider and determine the claim of the liquidator to the ownership of the work. *Re Canadian Shipbuilding Co.*, 564.

3. *Winding-up — Contributory — Shares Issued at a Discount as fully Paid-up—Ultra Vires—Liability of Allottee—Mistake of Law—Repudiation — Cancellation of*

*Allotment—Resolution of Shareholders—Ultra Vires — Ontario Companies Act, R.S.O. 1897, ch. 191, secs. 10, 33, 37—Allottee Treated as Shareholder—Knowledge and Acquiescence — Allotment of Half Share—Liability.*]—It is *ultra vires* of a company incorporated under the Ontario Companies Act, R.S.O. 1897, ch. 191, to issue shares at a discount; and *held*, that the respondent, who had paid for five shares and was allotted by the company seven and a half shares described as fully paid-up (the extra shares being regarded as paid for by services rendered in promoting the company), and had acquiesced and acted as a holder of seven and a half shares, was not entitled, upon the ground of mistake, to be relieved from his position as a shareholder in respect of the extra two and a half shares; and a resolution of the shareholders, “that all stock certificates which have been regarded in the light of bonus stock be recalled into the company,” and what was done under it, namely, the cancellation of the respondent’s certificate for seven and a half shares and the issue of a new certificate to him for five fully paid-up shares, were *ultra vires* of the company; and the respondent was liable, upon the winding-up of the company, as a contributory in respect of two unpaid shares—not two and a half, because there is no warrant in the Act to allot anything less than a share, and the respondent’s liability did not extend to the half share.—Sections 10, 33, and 37 of the Ontario Companies Act, R.S.O. 1897, ch. 191, considered.—Review and application of cases under the English Companies Acts.—*Ooregum*



*Gold Mining Co. of India v. Roper*, [1892] A.C. 125, specially referred to.—The mistake of the respondent was not a mistake of fact, but a mistake as to the law.—*Re Cornwall Furniture Co.* (1910), 20 O.L.R. 520, followed. *Re McGill Chair Co., Munro's Case*, 254.

4. *Winding-up — Directors — Misfeasance—Payment for Services as Workmen and Clerks — Ontario Companies Act, sec. 88.*—Section 88 of the Ontario Companies Act, 7 Edw. VII. ch. 34, providing that “no by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting,” applies to all cases in which a by-law is necessary for the payment, and covers the remuneration of all officers of the company whose appointment should properly be made by by-law.—*Birney v. Toronto Milk Co.* (1902), 5 O.L.R. 1, explained and followed.—But there is no warrant for extending the principle to a case in which the director has acted as a mere workman or clerk, and has been remunerated at a rate not exceeding the real value of the services rendered, at the ordinary market-price. The section itself does not prohibit the remuneration of a director; and the company cannot retain the benefit of the services rendered by a person employed in a subordinate capacity, who is also a director, without paying a fair price. If the statute renders the contract of hiring invalid, directors who have rendered manual and clerical services have a right to receive a *quantum meruit* for those services; and, if they have not received more, cannot be

held guilty of misfeasance.—*Burland v. Earle*, [1902] A.C. 83, 101, followed.—*Re Queen City Plate Glass Co., Eastmure's Case* (1910), 1 O.W.N. 863, *Re Morlock and Cline Limited, Sarvis and Canining's Claims* (1911), 23 O.L.R. 165, and *Benor v. Canadian Mail Order Co.* (1907), 10 O.W.R. 1091, distinguished. *Re Matthew Guy Carriage and Automobile Co.*, 377.

5. *Winding-up—Realisation of Assets — Claim by Trustee for Bondholders under Mortgage Given to Secure Bonds—Mortgage Covering Personal Property—Invalidity for Want of Registration—Bills of Sale and Chattel Mortgage Act, secs. 2, 5, 23—Agreement not to Register—Book-debts—Validity of Transfer without Registration — Absence of Notice to Debtors—Status of Liquidator to Contest Claim—Representation of Creditors—Jus Tertii—Parties.*]—An incorporated manufacturing and trading company made a mortgage to the plaintiff, as trustee for bondholders, to secure payment of its bonds, of “its undertakings then made or in course of construction or thereafter to be constructed, together with all the properties, real or personal, tolls, incomes, and sources of money, rights, privileges, and franchises, owned, held, or enjoyed by it.” The lands were specifically set out in the mortgage-deed; and it was “declared and agreed, for the purpose of this mortgage security, that all machinery, plant, and personal property of the company are to be considered fixtures to the realty. . . . This mortgage is not to be registered as a bill of sale or chattel mortgage.” The company made an assignment for the benefit of creditors; and a winding-up



order was afterwards made, under which the defendant was appointed liquidator; the defendant then took possession of all the assets, and realised such as were convertible. The plaintiff claimed the assets under the mortgage, and brought this action for an account, or, in the alternative, for damages for conversion:—*Held*, that, as the charge upon the company's real and personal property was not created by the bonds, but by the mortgage, the latter was, so far as it purported to charge personal property, a "mortgage or conveyance intended to operate as a mortgage of goods and chattels, within the meaning of secs. 2 and 23 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1897, ch. 148; and, not having been accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged, and not having been registered as a chattel mortgage, was, as such, under sec. 5 of the Act, "absolutely null and void as against creditors of the mortgagor." — *Johnston v. Wade* (1908), 17 O.L.R. 372, distinguished.—*Seem*, that, as a chattel mortgage, it was also void *ab initio* as against creditors, by reason of the agreement that it should not be registered under the Bills of Sale and Chattel Mortgage Act: *Clarkson v. McMaster & Co.* (1895), 25 S.C.R. 96, 105, 106.—*Held*, also, that, although the mortgage-deed did not specifically mention present or future book-debts, the language above-quoted was sufficient to create an equitable charge on present and future book-debts; that book-debts are not within the Bills of Sale and Chattel Mortgage Act, and a transfer of

them does not require registration; and, therefore, that as to any book-debts that were unpaid at the date of the assignment by the company, the plaintiff was entitled to recover the amount that was realised therefrom by the assignee or the defendant; and that the fact that no notice of the charge was given by the plaintiff to the debtors did not alter that right.—*Thibault v. Paul* (1894), 26 O.R. 385, and *Re Perth Flax and Cordage Co.* (1909), 13 O.W.R. 1140, specially referred to.—*Held*, also, that the liquidator, being from the beginning *prima facie* lawfully in possession of the property in question as an officer of the Court, and being charged with the duty of applying the proceeds in payment of the company's creditors in due course of administration, was entitled, in right of the creditors of the company, to contest the validity of the plaintiff's mortgage and to maintain in defence of the action the superior claim of the creditors whom it represented; and it was not necessary to have one of the creditors added as a party.—*Re Canadian Camera and Optical Co.* (1901), 2 O.L.R. 677, 679, followed. *National Trust Co. v. Trusts and Guarantee Co.*, 279.

See CONTRACT, 4—JUDGMENT DEBTOR.

### COMPENSATION.

See PARTNERSHIP.

### CONDITION.

See WILL.

### CONSENT.

See CRIMINAL LAW, 3.

## CONSOLIDATION OF ACTIONS.

See PRACTICE.

## CONSTITUTIONAL LAW.

*Ontario Railway Act, 1906, sec. 193*—*Proclamation of Governor-General Confirming — Dominion Railway Act, R.S.C. 1906, ch. 37, sec. 9 — Intra Vires — Railway Company Incorporated by Dominion Statute—Electric Railway — Work Declared to be for General Advantage of Canada — Running Electric Cars on Sunday—Penalties under Ontario Statute.*—The defendants were incorporated by Dominion statute 9 & 10 Edw. VII. ch. 120. On the ground, their line of electric railway extended only sixteen miles in the Province of Ontario, from London to Port Stanley, on Lake Erie; but power was given by the statute to establish a line of lake steamers to communicate with the State of Ohio at Cleveland; power was also given to construct various ramifications within Ontario; the undertaking was declared to be a work for the general advantage of Canada; and power was given to hold, maintain, and operate the railway subject to the provisions of the Dominion Railway Act, R.S.C. 1906, ch. 37. Neither that statute nor the incorporating Act prohibited the running of cars on Sunday; and the cars were run on the 11th, 18th, and 25th days of December, 1910, contrary to sec. 193 of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30:—*Held*, that the defendants' road was a local concern, with no such connection as would constitute it part of "a continuous route or system," and that the defendants' traffic was

not "through traffic," within the meaning of the Dominion Railway Act, sec. 9; so that the road, though declared to be a work for the general advantage of Canada, was yet, by virtue of the said sec. 9 (the original of which was 4 Edw. VII. ch. 32), subject to sec. 193 of the Ontario Railway Act, which was ratified and confirmed by proclamation of the Governor-General in Council of the 8th December, 1906, as authorised by the said sec. 9.—And *held*, that the conjoint legislation of the Dominion Parliament and the Ontario Legislature by the above-mentioned enactments was *intra vires*; and that the Court was justified in exacting penalties from the defendants for the breach of sec. 193 of the Ontario Act.—History and review of the legislation and decided cases. *Kerley v. London and Lake Erie Transportation Co.*, 588.

## CONTRACT.

1. *Family Settlement — Unfounded Claims—Fraud and Misrepresentation — Inducement for Executing Document — Threats—Absence of Independent Advice — Evidence — Threatening Letter Written "without Prejudice" pendente Lite — Admissibility.*—The defendant, who was the principal beneficiary under the will of her father, made an agreement with the plaintiffs, her brother and sister, and with another sister, by which she covenanted to pay over to them the greater part of what she was to receive under the will. One of the plaintiffs had opposed the granting of probate of the will, and had filed a *caveat*; and the agreement purported to be by

way of compromise or settlement of the plaintiff's claims to the estate:—*Held*, in an action to enforce the covenant, that, upon the evidence, the plaintiffs had no grounds for attacking the disposition of his property made by the father, and that the defendant was in fact induced, by threats made by her brother, one of the plaintiffs, to execute the agreement without competent independent advice and under pressure of the threats; and, therefore, the agreement was not enforceable.—A letter written to the defendant by her brother above-mentioned, *pendente lite*, and containing veiled threats, though purporting to be written "without prejudice," was admitted as evidence for the defendant.—*Pirie v. Wyld* (1886), 11 O.R. 422, followed.—Judgment of KELLY, J., reversed. *Underwood v. Cox*, 303.

2. *Renewal of Lease—Action by Lessor to Set aside—Absence of Pressure or Coercion—Execution by Lessor when in Prison under Conviction for Indictable Offence—Status of Convict—Freedom to Contract—Criminal Code, sec. 1033—Imperial Forfeiture Act.*—A convicted offender serving his term may deal with his goods and lands as other men who are free from custody may deal with theirs; and no disability or restraint is put upon the convict, so far as dealing with his property is concerned, beyond that which attaches to other owners. — Section 1033 of the Criminal Code, R.S.C. 1906, ch. 146, discussed.—The Forfeiture Act, 33 & 34 Vict. ch. 23 (Imp.), has no direct application to the state of affairs in Canada, and is not in force in Canada. — *Dumphy v. Kehoe*

(1891), 21 Rev. Leg. 119, approved and followed. — The plaintiff's action to set aside a renewal lease of hotel premises, executed by him when in prison serving a sentence for perjury, was dismissed, the plaintiff being free to deal with his property, and no case having been made out for relief on the ground of his being overborne by threats or pressure so that he was coerced into signing the document. *Young v. Carter*, 576.

3. *Sale of Timber—Statute of Frauds—Memorandum in Writing—Ostensible Agent—Ratification.*—*Held*, affirming the judgment of RIDDELL, J., 25 O.L.R. 365, that the agreement for the sale of timber alleged by the plaintiff was sufficiently evidenced by a memorandum in writing—the copy of the receipt signed by B., acting as if the defendants' agent in the transaction, and given to the plaintiff's agent, read with the receipt itself—to satisfy the Statute of Frauds; and (2) that the transaction was ratified by the defendants. *Thomson v. Playfair*, 624.

4. *Subscription for Bonds of Railway Company—Undertaking to Construct Branch Line—Signature to Agreement—Liability of Company—Personal Liability of President—Money Paid on Faith of Undertaking—Breach—Failure of Consideration—Non-performance of Promise—Damages—Assessment of—Allowance for Bonds.*—The plaintiffs, who were merchants and manufacturers carrying on business in a village, were induced by the defendant P., the president of the defendant railway company, to give financial assistance to the company, by



the purchase of bonds to be issued by the company to aid in the construction of a branch line which would give the village an advantageous railway connection. The bonds were not regarded as being of any great value; what the plaintiffs desired, and what P. promised, was the construction of the line:—*Held*, upon the evidence, that it was the intention of P. and the plaintiffs that P. should be personally bound; and that it was upon the faith of P.'s personal promise that the plaintiffs agreed to purchase the bonds.—A document embodying the arrangement made was drawn up and signed thus, "The Grand Valley Railway Company, A.J. Pattison, President," and was not otherwise signed by P.:—*Held*, that the signature was intended to be the signature of the company by P., its president; but, by the terms of the agreement actually made, and also by the document embodying the agreement, P. was intended to be personally bound; and the absence of his signature was not fatal.—*Held*, therefore, that both P. and the company were bound.—Upon the faith of the agreement, the plaintiffs and others subscribed for \$10,000 worth of bonds, and executed a joint promissory note for that amount. The note was discounted; the proceeds went to the credit of the company; and the bonds were allotted and distributed. The plaintiffs paid the note, and became entitled to the whole \$10,000 worth of bonds. The company did not construct the branch line; and the plaintiffs brought this action to recover the \$10,000, or for damages for breach of contract:—*Held*, that the plaintiffs were not entitled to recover the \$10,000 as

upon a failure of consideration, on their undertaking to return the bonds; for, although the bonds were not of great value, they formed part of the consideration; and money will not be ordered to be refunded, as upon failure of consideration, where the failure is the non-performance of a promise.—*Held*, however, that the plaintiffs were entitled to damages for the non-performance of the promise of P. and the company to construct the line; and those damages should, having regard to all the circumstances, be fixed at \$10,000; subject to a provision in ease of P. in regard to the bonds held by the plaintiffs. *Wood v. Grand Valley R. W. Co.*, 441.

See BANKS AND BANKING—COMPANY, 2—INFANT, 2—INSURANCE—ONTARIO RAILWAY AND MUNICIPAL BOARD—PRINCIPAL AND AGENT—RAILWAY, 1—VENDOR AND PURCHASER.

### CONTRIBUTORY.

See COMPANY, 3.

### CONVICT.

See CONTRACT, 2.

### CONVICTION.

See CRIMINAL LAW.

### CORPORATION.

See COMPANY—MUNICIPAL CORPORATIONS.

### CORROBORATION.

See HUSBAND AND WIFE, 2.

### COSTS.

*Criminal Proceedings—Order for Payment by Prosecutor of Costs of Accused—Taxation—Right of Appeal—Criminal Code,*



secs. 689, 1047—*Construction of Order—Right to Costs of Preliminary Inquiry before Police Magistrate — Mandatory Order.*]—No appeal lies from the taxation of costs pursuant to an order of the Court, under sec. 689 of the Criminal Code, for payment by the prosecutor of the costs of the accused.—Section 1407 of the Criminal Code is wide enough to apply to all costs ordered to be paid under any of the earlier provisions of the Code; and, there being no tariff of fees provided with respect to criminal proceedings, the tariff in force with respect to the costs of civil proceedings is applicable; but the right of appeal given in civil cases is not made to apply by the mere introduction of the civil tariff.—The order for payment of costs recited the information laid against the accused before a Police Magistrate, the committal of the accused for trial, and the notice of discontinuance given by the complainant; and the award was “of the costs occasioned by the said proceedings.”—*Held*, that the order adequately awarded the costs of the preliminary inquiry before the Police Magistrate; and that, upon the true construction of sec. 689, where costs are awarded in general terms, these include the costs of the appearance on the preliminary inquiry.—A mandatory order was made directing the local officer who had taxed the costs under the order to tax and allow to the accused his costs of the preliminary proceedings before the Police Magistrate. *Re Constantineau and Jones*, 160.

See COMPANY, 1—MORTGAGE, 2 — PROHIBITION — PUBLIC HEALTH ACT—WILL, 4.

## COUNTY COURTS.

See PROHIBITION — PUBLIC HEALTH ACT.

## COURT OF APPEAL.

See LUNATIC.

## COURTS.

See LUNATIC — PROHIBITION—PUBLIC HEALTH ACT—SURROGATE COURTS.

## COVENANT.

See MORTGAGE, 1.

## CREDITORS.

See COMPANY.

## CRIMINAL LAW.

1. *Exposing for Sale or Selling Obscene Books—Criminal Code, sec. 207 — Conviction — Evidence — Knowledge of Sale and of Character of Books.*]—To sustain a conviction under sec. 207 of the Criminal Code, R.S.C. 1906, ch. 146, as amended by 8 & 9 Edw. VII. ch. 9, for selling or exposing for sale obscene books, it must be shewn that the books were sold or exposed for sale with the knowledge of the defendant, and that he knew of their obscene character.—And *held*, upon a case stated by a Police Magistrate, that, having regard to the character and extent of the defendant's business and to his reputation as a book-seller, there was no reasonable evidence upon which he might be convicted of having knowingly sold or exposed for sale obscene books, within the meaning of sec. 207. *Rex v. Britnell*, 136.

2. *Indictment — Amendment — Jurisdiction—Offence of Different Nature — Obtaining Money by False Pretences — Obtaining*

*Credit by False Pretences—Criminal Code, secs. 405, 405A, 1019—Grand Jury—Substantial Wrong or Miscarriage.*]—The defendant was charged with the offence of obtaining money by false pretences, contrary to sec. 405 of the Criminal Code, and a true bill was found against him by the grand jury. In the course of the trial, the Judge amended the indictment so as to make it one of obtaining credit by false pretences, contrary to sec. 405A; and the defendant was found "guilty:"—*Held*, that the two charges were not substantially for an offence of the same kind; having regard to *Regina v. Boyd* (1896), Q.R. 5 Q.B. 1, and the amendment of the Criminal Code by 7 & 8 Edw. VII. ch. 18, sec. 6, adding sec. 405A, the amended charge was not one coming within the provisions of sec. 405, or of the same nature, so as to justify the amendment; and there was no jurisdiction to try the defendant upon the new indictment; it was his right to have that charge first dealt with by a grand jury; and not to be put in jeopardy without their consent; and so some substantial wrong or miscarriage occurred at the trial, excluding resort to sec. 1019 of the Criminal Code to sustain the conviction. *Rex v. Cohen*, 497.

3. *Keeping Common Betting-house — Jurisdiction of Police Magistrate—Criminal Code, secs. 773, 774 — Summary Trial without Consent of Accused — Evidence — Admissibility — Articles Seized on Premises of Accused — Absence of Proper Warrant under secs. 641, 642.*]—Under secs. 773 and 774 of the Criminal Code, as amended by 8 & 9 Edw. VII. ch. 9 (schedule), a Police Magistrate has the

right to refuse to allow persons accused of keeping a disorderly house, that is to say, a common betting-house, to elect to be tried by a jury, and to try them summarily, without their consent.—Upon the trial of the accused, the Police Magistrate was right in admitting, as evidence against them, certain articles seized by police constables upon the premises of the accused, even though the entry of the constables upon the premises was without a proper warrant under secs. 641 and 642 of the Code, and a trespass. *Rex v. Honan*, 484.

4. *Keeping Disorderly House—Indictment at Sessions—Conviction — Evidence to Sustain—Judge's Charge—Reference to Conviction of Previous Occupant — Right of Prisoner, after Indictment Found, to Elect Trial without Jury—Criminal Code, secs. 225, 228, 825, 873—Re-election—Notice to Sheriff.*]—The defendant was indicted at the Sessions for keeping a disorderly house, that is to say, a common bawdy house, contrary to secs. 228 and 225 of the Criminal Code, and was tried by a jury and found guilty. Upon a case reserved by the Chairman of the Sessions:—*Held*, that there was valid evidence that the defendant was the keeper of a disorderly house; and that a reference, in the Chairman's charge to the jury, to a woman who had been previously convicted, was not erroneous.—2. The defendant had been committed for trial by a magistrate, but the indictment on which he was convicted was not preferred by the person (if any) bound over to prosecute, but by the County Crown Attorney, with the written

consent of the trial Judge, under sec. 873 of the Code. After a true bill had been found by the grand jury, and before arraignment or plea, the defendant asked to be allowed to elect to be tried by the County Court Judge without a jury under the Speedy Trials sections of the Code:—*Held*, that he was not entitled so to elect.—*Per Moss, C.J.O.*:—Where a person committed for trial, and whether in custody or upon bail, has not before a bill of indictment has been found against him by a grand jury, taken the steps necessary to enable him to elect to be tried by a Judge without a jury, he is not, upon bill found and arraignment thereon, entitled as of right to ask to be allowed to elect to be tried without a jury. The right is given only in cases in which the exercise of such an election would or might effect a speedy trial of an accused person, and thereby save the delay which waiting for a trial by jury might involve.—*Per MACLAREN, J.A.*:—It must be assumed that the charge in the indictment was not the same as that upon which the defendant was committed, or as any other charge appearing in the evidence before the magistrate, as, in either of these events, the County Crown Attorney would not, under sec. 871, have needed the consent of the Judge to prefer the indictment; and it is clear from sec. 825 *et seq.* of the Code that a speedy trial before a Judge can be had only upon a charge on which the magistrate has committed the accused, or upon one which appears in the evidence before him. But, even if the indictment had been based upon a charge for which the accused had been committed or which appeared in the

depositions, he should have elected before the true bill was found by the grand jury.—*The King v. Komiensky* (1903), 6 Can. Crim. Cas. 524, and *The King v. Wener* (1903), *ib.* 406, approved.—*Per MAGEE, J.A.*:—*Rex v. Thompson* (1908), 17 Man. L.R. 608, approved. — *Per MACLAREN and MAGEE, JJ.A.*:—The defendant, not having given to the Sheriff the notice required by sub-sec. 6 of sec. 825 of the Code (as added by 8 & 9 Edw. VII. ch. 9), was not in a position to claim the right to re-elect. *Rex v. Sov-reen*, 16.

*See* CONTRACT, 2 — COSTS — PROHIBITION.

### CROWN.

*See* SUCCESSION DUTY.

### CROWN PATENT.

*See* WATER AND WATER-COURSES.

### CUSTODY OF INFANT.

*See* INFANT, 2.

### DAMAGES.

*See* CONTRACT, 4—PRACTICE—SLANDER—WATER AND WATER-COURSES.

### DEATH.

*See* INSURANCE.

### DEBENTURES.

*See* BANKS AND BANKING, 1—COMPANY, 5—CONTRACT, 4.

### DECLARATION.

*See* MUNICIPAL ELECTIONS.

### DEED.

*See* CHURCH—HUSBAND AND WIFE, 1—MORTGAGE.



**DEFAMATION.**

See SLANDER.

**DEPOSIT OF TITLE DEEDS.**

See MORTGAGE, 2.

**DEVIATION.**

See HIGHWAY.

**DIRECTORS.**

See COMPANY, 1, 4—JUDGMENT DEBTOR.

**DISCOVERY.**

*Examination of Party—Question as to Document not Mentioned in Affidavit on Production—Indirect Method of Cross-examination on Affidavit—Con. Rule 490.]*

—In an action for a death claim upon an accident insurance policy, one of the defences being misrepresentation as to age, the plaintiff, upon examination for discovery, refused to answer the question whether the marriage certificate of the deceased (which would or might, as it was admitted, assist in proving the age of the deceased) was in the possession of his solicitors. This document was not mentioned in the plaintiff's affidavit on production; and it was contended that the question was an attempt to cross-examine the plaintiff upon that affidavit:—*Held*, that, while Con. Rule 490 prevents cross-examination on an affidavit on production, it does not prevent any examination being had or questions asked which could be had or asked otherwise than on a cross-examination on such an affidavit; and, as the document could be called for at the trial, and (apart from the question as to the affidavit) upon examination for discovery, the question should be answered.

—Information which would otherwise be compellable on an examination for discovery does not become privileged if and when an affidavit on production is made, merely because the information sought would contradict the affidavit or form a basis for a motion for a better affidavit.—Review of the practice and authorities.—*Dryden v. Smith* (1897), 17 P.R. 500, and *Standard Trading Co. v. Seybold* (1902), 1 O.W.R. 650, explained and distinguished.—Order of the Master in Chambers affirmed. *MacMahon v. Railway Passengers Assurance Co.*, 430.

**DISCRETION.**

See PROHIBITION—TRIAL.

**DISCRIMINATION.**

See MUNICIPAL CORPORATIONS, 1.

**DISORDERLY HOUSE.**

See CRIMINAL LAW, 4.

**DIVISIONAL COURT.**

See LUNATIC.

**DOWER.**

*Mortgaged Land—Mortgage to Secure Purchase-money—Bar of Dower—Sale of Land by Administrator of Deceased Mortgagor—Widow's Right to Sum in Lieu of Dower—Extent of Claim on Purchase-money—42 Vict. ch. 22, secs. 1, 2(O.)—58 Vict. ch. 25, sec 3(O.)]*—Land was purchased by and conveyed to A. in 1898. The purchase-price was \$3,000; and it was recited in the conveyance, which was dated the 1st November, 1898, that it had been agreed that \$2,800 of this sum should remain a lien upon the land, to be collaterally



secured by a mortgage of it; and the grantor released to A. all his claims upon the land, "excepting the said lien for unpaid purchase-money and mortgage to be given therefor." The mortgage bore the same date, and A.'s wife joined in it to bar her dower. The mortgage-money was reduced by payment to \$1,700 in the lifetime of the mortgagor, and he died intestate on the 12th May, 1900, his wife surviving him. The land was sold by his administrator for \$5,250:—*Held*, that the wife's dower was to be calculated on the proceeds of the sale of the land after deducting the amount remaining due upon the mortgage at the time of the death of A.—Review of the authorities and consideration of secs. 1 and 2 of 42 Vict. ch. 22(O.) and sec. 3 of 58 Vict. ch. 25(O.)—Decision of MIDDLETON, J., reversed. *Re Auger*, 402.

#### **EASEMENT.**

*See* WATER AND WATER-COURSES.

#### **ECCLESIASTICAL LAW.**

*See* CHURCH.

#### **ELECTION.**

*See* CRIMINAL LAW, 4—WILL, 4.

#### **ELECTIONS.**

*See* MUNICIPAL ELECTIONS.

#### **EQUITABLE MORTGAGE.**

*See* MORTGAGE, 2.

#### **EVIDENCE.**

*See* CONTRACT, 1—CRIMINAL LAW, 3—DISCOVERY—HUSBAND

AND WIFE, 2—INSURANCE, 2, 4, 5  
—LUNATIC—RAILWAY, 3—SLANDER.

#### **EXAMINATION OF JUDGMENT DEBTOR.**

*See* JUDGMENT DEBTOR.

#### **EXAMINATION OF PARTY.**

*See* DISCOVERY.

#### **EXECUTION.**

*See* COMPANY, 1.

#### **EXECUTORS AND ADMINISTRATORS.**

*See* HUSBAND AND WIFE, 2.

#### **EXEMPTION.**

*See* RAILWAY, 1.

#### **FALSE PRETENCES.**

*See* CRIMINAL LAW, 2.

#### **FAMILY SETTLEMENT.**

*See* CONTRACT, 1.

#### **FIDUCIARY RELATIONSHIP.**

*See* INSURANCE, 5.

#### **FLOATING SECURITY.**

*See* BANKS AND BANKING, 1.

#### **FORFEITURE ACT (IMP.).**

*See* CONTRACT, 2.

#### **FRAUD AND MISREPRESENTATION.**

*See* CONTRACT, 1—INSURANCE, 5.

#### **GARNISHMENT.**

*See* ATTACHMENT OF DEBTS.

#### **GIFT.**

*See* WILL.

**GRAND JURY.**

See CRIMINAL LAW, 2.

**HIGHWAY.**

*Township Boundary Line — "Deviation" — Substitution — Municipal Act, 1903, sec. 622.]—Held*, affirming the judgment of a Divisional Court, 23 O.L.R. 583, that the road in question was and is a "deviation" of a town-line road, within the meaning of sec. 622 of the Municipal Act, 1903.—*Township of Fitzroy v. County of Carleton* (1905), 9 O.L.R. 686, specially referred to. *County of Wentworth v. Township of West Flamborough*, 199.

**HUSBAND AND WIFE.**

1. *Alimony—Separation Deed —Payment of Gross Sum — Absence of Provision for Maintenance of Wife.]—By the terms of a separation deed, husband and wife agreed to live apart, and each agreed not to take any proceedings against the other for restitution of conjugal rights and not to annoy or interfere with the other in any manner whatsoever; the husband agreed to pay the wife \$250; the wife agreed to pay her own debts, save three named accounts, and to support the two children. No provision was made in the deed for the maintenance of the wife; she did not covenant not to claim alimony; nor did she covenant to maintain herself.—Held*, that the sum of \$250 could not be regarded as intended for the maintenance of the wife: it was not so stipulated in the deed; and, apart from the fact that the sum was inadequate for that purpose, it might have been a payment made to induce the wife to assume care of the children.—*At-*

*wood v. Atwood* (1893-4), 15 P.R. 425, 16 P.R. 50, considered.—*Held*, also, that the agreement to live apart did not relieve the husband from his obligation to maintain his wife; and, no provision having been made for her separate maintenance, she was entitled to alimony.—Judgment of CLUTE, J., affirmed. *Frémont v. Frémont*, 6.

2. *Authority of Wife to Pledge Husband's Credit for Necessaries —Limitation of Authority — Evidence — Corroboration — Action by Executrix—Running Account —Payments—Statute of Limitations.]—The executrix of S. sued the defendant for the balance of an account for goods alleged to have been supplied by S. to the defendant, upon the order of his wife:—Held*, upon the evidence, that the goods supplied were necessaries suitable to the station of the defendant and the style in which he lived; and, therefore, his wife's authority to bind the defendant should be presumed.—*And held*, that the presumption of authority had not been rebutted by the evidence; that corroboration of an alleged instruction to the defendant's wife not to run a bill was necessary, the action being brought by an executrix—and no such corroboration was furnished.—*Per RRD-DELL, J.*:—The alleged limitation of authority was not made out, even if the defendant's evidence should have full credence and effect: his instruction to his wife was no more than a warning not to get into debt.—*Held*, also, that the whole of the account—a running account beginning in 1882—was kept alive by payments, and that there never was a time when any part or item of

it was barred by the Statute of Limitations; and, the debt being known and acknowledged, time being asked and accorded, payments in some instances having been made specifically with reference to it, and there having been no other debt, the plaintiff's claim was not barred.—The payment of a part is an act from which the inference may be drawn that the debtor intended to pay the balance, though no special reference is made thereto at the time; and a payment on account of a debt is such part payment.—*Ball v. Parker* (1876), 39 U.C.R. 488, and *Boulbee v. Burke* (1885), 9 O.R. 80, followed. *Scott v. Allen*, 571.

See DOWER.

### IMPRISONMENT.

See CONTRACT, 2.

### IMPROVIDENCE.

See SUCCESSION DUTY.

### INDEMNITY.

See INSURANCE.

### INDEPENDENT ADVICE.

See CONTRACT, 1.

### INDICTMENT.

See CRIMINAL LAW, 2, 3, 4.

### INFANT.

1. *Bank Deposit—Withdrawal by Cheque in Favour of Another—Obligation of Bank—Interest of Infant—Bills of Exchange Act, sec. 48—Liability of Bank for Amount beyond \$500—Bank Act, sec. 95—Construction and Application—"Law of the Province"—Delay in Bringing Action after Majority—Mistake as to Age—Absence of Knowledge by Bank of*

*Infancy.*—A cheque drawn by an infant upon a bank entitles the holder to receive payment, and so constitutes a discharge. An infant cannot claim again money paid out to him or another on his cheque.—Where an infant deposits money in a bank, the bank's obligation is to hand back the money to the infant or pay it to his order. Nothing in this is detrimental in any way to the interest of the infant.—Apart from the general law as to infants' contracts, under sec. 48 of the Bills of Exchange Act (made applicable to cheques by sec. 165), a cheque drawn by an infant entitles the holder to receive payment thereof; and the payment operates to discharge the bank.—Section 95 of the Bank Act imposes no restriction upon repayment by the bank of a deposit in excess of \$500 made by an infant. The restriction is upon the amount of deposit; and if, as a matter of policy, the Legislature requires an infant's account to be kept under \$500, and the bank, in ignorance of the fact that the depositor is an infant, receives a sum in excess of \$500, it becomes the bank's duty, on learning of his minority, to repay the excess to the infant. Section 95 affords no sanction for the argument that, because \$1,800 was unlawfully received by the bank from the infant, and paid out on the infant's order, the infant was entitled to demand payment of \$1,300, the disability having ceased. And, at any rate, sec. 95 is not applicable, because there is no "law of the Province" which prevents an infant from depositing money in and withdrawing it from the bank, even assuming that the expression "law of the Province"

is not to be confined to an express statutory provision. — The plaintiff in this case, suing the bank for part of the money which it had paid out upon his order, should have come to the Court promptly after his disability ceased; a delay of a year and a half after majority was fatal to his claim; and it was no excuse that he had been misled by his mother as to the date of his birth.—Upon the evidence, the bank acted honestly, without any knowledge of the plaintiff's infancy, and there was nothing in his appearance to indicate infancy or to provoke inquiry. *Freeman v. Bank of Montreal*, 451.

2. *Custody — Habeas Corpus — Right of Father against Maternal Grandparents — Welfare of Child — Agreement under Seal — Adoption* — 1 Geo. V. ch. 35, sec. 3 — *Application of sub-sec. (2) to Father of Child — Principles of Equity — Conduct of Father.*]—Upon an application, on the return of a *habeas corpus*, by the father of a child under three years of age, for the delivery of the child to him by the maternal grandparents:—*Held*, by BOYD, C., upon the evidence, that, apart from agreement, the interests of the child would be better served by leaving her with the grandparents; the father having all reasonable access to her.—*Held*, also, that an instrument signed and sealed by the father, in view of the mother's impending death, by which the possession, custody, control, and care of the child, was placed in the hands of the grandparents, was, while it stood, a bar to the father's application; and it was valid in law under R.S.O. 1897, ch. 340, sec. 2 (now

1 Geo. V. ch. 35, sec. 3).—*Re Davis* (1909), 18 O.L.R. 384, distinguished.—*Quære*, whether a father is included in the words used in sub-sec. (2).—*Semble*, that, apart from the statute, if the agreement were made by the father in pursuance of an understanding that the child was to inherit the property of the grandparents, and if she were brought up by them under that impression, and if that were supplemented by an actual deed or will, irrevocable, to such effect, the Court, acting on principles of equity, would not, at the father's instance, disturb that arrangement.—*Held*, therefore, in the peculiar circumstances of the case, that the custody should not be changed. — *Ex p. Templer* (1847), 2 Saund. & C. 169, followed.—*Held*, by a Divisional Court, reversing the decision of BOYD, C., that the statute 1 Geo. V. ch. 35, sec. 3, did not apply to this case, in which a father was asserting his right to the custody of his infant child; that the father was not bound by, but was at liberty to revoke or ignore, the agreement which he had made with the maternal grandparents under which they claimed the right to the custody of the child; and that no misconduct on the part of the father such as would induce the Court to take the custody of his child from him, had been shewn.—Review of the authorities. *Re Hutchinson*, 113, 601.

See INSURANCE, 4—SURROGATE COURTS.

## INJUNCTION.

See WATER AND WATER-COURSES.



**INSOLVENCY.***See* COMPANY.**INSPECTION AND SALE ACT.***See* PROHIBITION.**INSURANCE.**

1. *Accident Insurance — Death Claim—Cause of Death — Construction of Policies—“Caused by the Burning of a Building”—“Injuries Happening from Fits” — Efficient Cause—Quantum of Indemnity.*—W., who was insured by the defendants under two policies of accident insurance, entered a wooden building at night, with a lighted lantern; while there he had a fit, and in the fit dropped or knocked over the lantern; the lantern exploded or was broken, the oil escaped from it, and a flame arose, which enveloped the deceased, and inflicted injuries from which he died:—*Held*, that the injuries were not “caused by the burning of a building,” within the meaning of a double indemnity clause in the policies.—And *held* (LATCHFORD, J., dissenting), that the case was not one of “injuries happening from any of the following causes . . .”—one of the causes specified being “fits”—within the meaning of a clause in the policies limiting the amount payable in such cases to one-tenth of the amount of the single indemnity. The fit was not the efficient cause of the death. The injuries “happened” not from the fit, but from the fire. The cause of an efficient cause is not itself an efficient cause or *causa causans*.—Review of the authorities.—Judgment of MIDDLETON, J., varied. *Wadsworth v. Canadian*

*Railway Accident Insurance Co.*, 55.

2. *Accident Insurance — Death Claim—Cause of Death—Injury from Lifting Heavy Weight—Evidence—Statement of Deceased — Admissibility—Conditions of Original Policy — Non - compliance with—Renewal Receipt — Fresh Contract—Reference to Original Policy—Sufficiency — Insurance Act, R.S.O. 1897, ch. 203, sec. 144.*—In an action by the beneficiary under a contract insuring Y. against accident and death from accident, to recover the amount payable upon death from accident, it appeared that, on the day before his death, Y. had lifted a heavy weight, and, shortly after doing so, had stated to S. that he thought he had hurt himself. According to the medical evidence, the malady from which Y. died was caused by the invasion of the system by pernicious bacteria, and this invasion might have been occasioned by an internal injury:—*Held*, that evidence of the statement made to S. was admissible for the purpose of proving the physical condition of Y., and was sufficient to establish that, shortly after Y. had been engaged in lifting, he had, as he said, indications that he had been hurt.—*Gilbey v. Great Western R.W. Co.* (1910), 102 L.T.R. 202, specially referred to.—And *held*, that from the fact of the injury the inference might be drawn that the lifting was the cause of it; the symptoms indicated that Y. did suffer an injury in lifting; and, upon the evidence, this injury was the cause of his death—it being a possible cause and the only one of several possible causes shewn to have actually existed;

and the evidence shewed that up to the happening of the accident Y. appeared to be in perfect health.—*In re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591, followed.—The policy issued upon the original insurance, in 1902, contained provisions and stipulations as to notice, made conditions precedent to the right to recover; and these had not been complied with. This policy did not contemplate any renewal; it evidenced an insurance for one year only. The plaintiff relied upon what was called a renewal receipt, as a new contract of insurance. It did not contain the provisions as to notice; it evidenced an insurance for a year “according to the tenor” of the original policy, referring to it by number:—*Held*, that the contract evidenced by the renewal receipt was to be regarded as a new insurance, depending entirely upon a new agreement between the parties.—*Carpenter v. Canadian Railway Accident Insurance Co.* (1909), 18 O.L.R. 388, followed.—But *held*, that the reference to the former policy was a sufficient compliance with the provisions of the Insurance Act, R.S.O. 1897, ch. 203, sec. 144, requiring the terms and conditions of the contract to be set out on the face or back of the instrument; and, therefore, by reason of the plaintiff’s non-compliance with the conditions of the original policy, she could not recover.—*Venner v. Sun Life Insurance Co.* (1890), 17 S.C.R. 394, and *Jordan v. Provincial Provident Institution* (1898), 28 S.C.R. 554, followed. *Youlden v. London Guarantee and Accident Co.*, 75.

3. *Accident Insurance*—*Temporary Total Disability*—*Double*

*Indemnity*—“*Riding as a Passenger*”—*Injury to Assured on Highway after Alighting from Street Car.*—The judgment of MEREDITH, C.J.C.P., 25 O.L.R. 80, upon the facts there stated, was affirmed as to total disability and reversed as to double indemnity—it being *held*, that the plaintiff was not “riding as a passenger” upon the street car from which he had alighted when he received the injuries upon which his claim to the double indemnity was based. *Wallace v. Employers’ Liability Assurance Corporation*, 10.

4. *Life Insurance* — *Benefit Certificate*—*Beneficiary*—“*Adopted*” *Daughter*—*Death of*—*Claim by Infant Children of*—*Rules of Insurance Society*—*Insurance Act*, R.S.O. 1897, ch. 203, sec. 151 (3)—*Law of Ontario as to Adoption*—1 Geo. V. ch. 35, sec. 3—*Preferred Beneficiaries* — *Endorsement in Favour of Beneficiary for Value* — *Validity* — *Evidence* — *Next Friend of Infants*—*Status*—*Certificate Endorsed as Security for Advances*—*Inquiry as to Amount Advanced.*—Section 3 of 1 Geo. V. ch. 35 is derived from 12 Car. II. ch. 24, sec. 8, and carries the law no further than that enactment. Its effect is not to take away any of the rights of a father in respect of the custody of his child, but to enable the father to take away the common law rights of others; the statute does not exclude the right of the father himself; he cannot get rid of his parental right irrevocably by an agreement; such a deed or agreement is revocable, even by will. The law of Ontario, strictly speaking, knows nothing of adoption; and the term “legal adoption” has no meaning, in the proper use of the words.—*Re Davis* (1909), 18 O.L.R. 384,

followed.—*Re Hutchinson* (1912), 26 O.L.R. 113 (since reversed), not followed.—In 1901, R. became a member of a benefit society, the Royal Arcanum, incorporated in the State of Massachusetts but doing business in Ontario, and the Society issued to him in Ontario a benefit certificate whereby it agreed “to pay . . . to L. H. (adopted daughter) a sum not exceeding \$1,500 in accordance with and under the laws governing said fund”—that is, the beneficiary fund of the society—“upon satisfactory evidence of the death of said member . . .” L. H. died in 1909, leaving infant children. Thereafter, R. endorsed upon the certificate, under his signature and seal, a direction that all benefits thereunder should be paid to the defendant, “who for many years has advanced money to me and kept up the premiums, and who is a holder of this certificate for value.” R. died a widower and childless in 1911. The insurance or benefit moneys were claimed by the defendant under the endorsement, and also by the plaintiffs (next friend), on behalf of the children of L. H., under the rules of the society:—*Held*, that, as the society was not incorporated under the Benevolent and Provident Societies Act, R.S.O. 1897, ch. 211, the insurance moneys were not payable “to the person or persons entitled under the rules” of the society (sec. 12); sec. 151 (3) of the Insurance Act, R.S.O. 1897, ch. 203, was applicable (sec. 147); and the rules of the society must give way to the provisions of the statute so far as inconsistent therewith.—*Gillie v. Young* (1901), 1 O.L.R. 368, followed.—And *held*, that the infants were not

the designated preferred preferred beneficiaries of R.; they were not preferred beneficiaries at all, within the meaning of the statute, R. not having been their grandfather in a legal sense; and he made a new beneficiary under the provisions of the law in that regard.—*Held*, also, that the plaintiffs, as next friend, were not entitled to the infants’ money; and the infants were not entitled to the money in any case.—*Held*, also, that the endorsement on the certificate was valid under the statute; and the plaintiffs’ attack upon it, on the grounds that it was not read to or by R., and that it was ignored and treated as null and void by both R. and the defendant until the death of R., failed upon the evidence; and the defendant was entitled to receive the amount due upon the certificate, unless the plaintiffs could shew that his advances were less than that amount.—*Semble*, that the infants would have been entitled to the money under the rules of the society, if it had been considered that the rules should prevail. *Fidelity Trust Co. v. Buchner*, 367.

5. *Life Insurance — Benefit Certificate — Change of Beneficiaries — Person Benefiting by Change — Validity — Onus — Agreement not to Change — Failure of Proof — Mental Capacity of Assured — Fraud — Undue Influence — Fiduciary Relationship.*—The assured had apportioned the insurance moneys to arise from an endowment certificate upon his life, among his wife and two daughters; but, while living at the house of one of his daughters, shortly before his death, and when he was in a feeble state, he purported, by the execution of a



written instrument, to change the apportionment so as to make that daughter (the defendant) the sole beneficiary:—*Held* (GARROW, J.A., dissenting), that no agreement between the assured and his wife to the effect that the assured would make no change in the beneficiaries, was proved; that the onus was upon the plaintiffs to shew that the instrument changing the apportionment was invalid and ineffectual, and they had not discharged that onus; and that the defendant was entitled to the insurance moneys, subject to repayment to the widow of the assured of the sums paid by her to keep the certificate alive (as agreed to by the defendant).—Judgment of a Divisional Court, 24 O.L.R. 174, reversed.—*Per Moss, C.J.O.*:—The assured had the right by law to change the nomination of beneficiaries within the scope of the certificate; and, in order to avoid his act, it was incumbent upon those impeaching its effect to shew mental incapacity or fraud or undue influence, or such a fiduciary relationship as would shift the onus; and the plaintiffs had shewn none of these things. The affirmative is not proved, because the witness for the negative is not wholly and entirely to be believed (*Nobel's Explosives Co. v. Jones* (1881), 17 Ch.D. 721, 739). The evidence failed to establish a want of capacity in the assured to understand the nature of the transaction or to appreciate its effect.—*Per MEREDITH, J.A.*:—"Righteousness," as applied to proof in such cases as *Fulton v. Andrew* (1875), L.R. 7 H.L. 448, means no more than that the document propounded is really the will of the testator:

to import into the word any such meaning as that it must be proved that the will is a fair or just one, or such as a reasonable man ought to make, is entirely wrong. The onus shifts; presumption of knowledge and approval of the contents of the will, from proof of its due execution by a competent testator, to whom the will was read over, or who has read it, is displaced: actual knowledge and approval must be proved by those who take a benefit under it and who have been instrumental in making it; the conscience of the Court must be satisfied, that is all. The circumstances were not such as to make it necessary that the deceased should have the advice of an independent solicitor when effecting the change of beneficiaries. The agreement relied on was not proved. The wife could not be a "beneficiary for value," not being expressly so designated in the certificate. And the Courts below had not found, and there could not, on the evidence, be a finding of, either want of mental capacity or undue influence.—*Per GARROW, J.A.*:—The substantial issue between the parties arose upon the plaintiffs' allegation of fraud and undue influence on the part of the defendant in procuring the assured to execute the instrument effecting the change of beneficiaries; and that issue, which alone was sufficient to dispose of the whole case, should be found in favour of the plaintiffs. *Clark v. Loftus*, 204.

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## INTERCHANGE OF TRAFFIC.

See STREET RAILWAYS.



## JUDGMENT.

See ATTACHMENT OF DEBTS—  
PUBLIC HEALTH ACT—RAILWAY,  
2.

## JUDGMENT DEBTOR.

*Company — Examination of Director as Officer—Con. Rule 902 —Practice — Order for Examination — Subpœna — Loan Corporations Act—Incorporation of Company by Letters Patent—Power to Sue and be Sued—Effect of Non-registration—Provisions of Charter.]—*For the purposes of Con. Rule 902, providing for the examination, by a creditor who has obtained a judgment against a corporation, of “any of the officers of such corporation,” the word “officers” includes a director; and *held*, that R., who had been held out as president of a judgment debtor corporation, was a proper officer to examine under the Rule, touching the matters set out in the Rule.—*Seem*, that an order for the examination of an officer of the corporation, under the Rule is unnecessary.—Where the Master in Chambers had made an order (which had not issued) for the examination of R., a Judge in Chambers, upon appeal, substituted for it an order for the issue of a subpœna for the examination of R.—It was objected by R. that the judgment debtor corporation was non-existent as a company, and that the judgment was a nullity. By letters patent from the Crown (Province of Ontario) issued on the 29th November, 1910, R. and five other persons, and all such persons as should hereafter become shareholders, were constituted a body corporate under the provisions of the Loan Corporations Act, R.S.O. 1897,

ch. 205, and amending Acts, “and (so long as the company stands duly registered in the terms of the said the Loan Corporations Act) capable of exercising all the functions of an incorporated company.” The company was not registered:—*Held*, that a body corporate was formed by the letters patent, and none the less so because it was not to exercise the functions of a loan company until it was registered; the body corporate could sue or be sued by its corporate name; the provision in the letters patent, apparently giving that power only so long as the company was registered, was not justified by the Act, and was wholly unnecessary; the power existed without any such provision; and, granted incorporation which was effective by the statute, there was no power to limit the effect thereof by a provision in the letters patent. *Powell-Rees Limited v. Anglo-Canadian Mortgage Corporation*, 490.

## JURISDICTION.

See CRIMINAL LAW, 2 —  
ONTARIO RAILWAY AND MUNICIPAL BOARD — PROHIBITION —  
PUBLIC HEALTH ACT — STREET  
RAILWAYS—SURROGATE COURTS.

## JURY.

See RAILWAY, 3—SLANDER—  
TRIAL.

## JUS TERTII.

See COMPANY, 5.

## KEEPING COMMON BETTING-HOUSE.

See CRIMINAL LAW, 3.

# **KEEPING DISORDERLY HOUSE.**

See CRIMINAL LAW, 4.

# **LACHES.**

See INFANT, 1.

# **LAND TITLES ACT.**

See MORTGAGE, 1.

# **LANDLORD AND TENANT.**

See CONTRACT, 2.

# **LEASE.**

See CONTRACT, 2.

# **LEGACY.**

See SUCCESSION DUTY—WILL.

# **LICENSE.**

See MINES AND MINERALS.

# **LIEN.**

See PROMISSORY NOTES.

# **LIMITATION OF ACTIONS.**

See HUSBAND AND WIFE, 2—  
MORTGAGE, 1.

# **LIQUIDATOR.**

See COMPANY.

# **LOAN CORPORATIONS ACT.**

See JUDGMENT DEBTOR.

# **LOCAL BOARD OF HEALTH.**

See PUBLIC HEALTH ACT.

# **LOCAL OPTION.**

See MUNICIPAL CORPORATIONS,  
2.

# **LORD'S DAY.**

See CONSTITUTIONAL LAW.

# **LUNATIC.**

*Inquiry under Lunacy Act, sec.  
7—Finding by Trial Judge—*

*Reversal by Divisional Court—  
New Evidence — Retrial — Re-  
examination of Supposed Lunatic  
—Judgment as by Court of First  
Instance — Con. Rule 498 —  
Powers of Court—Further Appeal  
to Court of Appeal—New Trial—  
1 Geo. V. ch. 20—Application to  
Pending Inquiry.]—Held, re-  
versing the judgment of a Divi-  
sional Court, 24 O.L.R. 222,  
which reversed the judgment of  
BRITTON, J., finding an issue as  
to lunacy in favour of M. F., the  
supposed lunatic, that that Court  
had no power to take the course  
it did, namely, to open up the  
case, hear fresh evidence, and  
determine the issue as if a Court  
of first instance; nor had the  
Divisional Court the power, given  
to the trial Judge by sec. 7 (4) of  
the Lunacy Act, to examine M.  
F.—Held, also, that, in the cir-  
cumstances, the Court of Appeal,  
instead of determining the case  
upon the evidence which was  
before the trial Judge, should do  
what the Divisional Court might  
have done—that is, direct a new  
trial.—Per MEREDITH, J.A., dis-  
senting, that the course taken by  
the Divisional Court was proper,  
and its determination that M. F.  
was of unsound mind and unable  
to manage himself or his affairs  
was warranted by the evidence  
taken.—Per MEREDITH, J.A.,  
also, that the provisions of 1  
Geo. V. ch. 20, passed after the  
judgment of the trial Judge, but  
before the additional evidence  
was taken by the Divisional  
Court, were applicable to the  
case. *Re Fraser, Fraser v. Rob-  
ertson, McCormick v. Fraser*, 508.*

# **MAINTENANCE.**

See HUSBAND AND WIFE, 1.

**MANDAMUS.**

See COSTS—PUBLIC HEALTH ACT.

**MASTER AND SERVANT.**

See RAILWAY, 2, 3.

**MEDICAL PRACTITIONER.**

See PUBLIC HEALTH ACT.

**MINES AND MINERALS.**

*Miner's License—Failure to Renew—Discovery and Staking after Expiry—Invalidity—Mining Act of Ontario, 1908, secs. 22 (1), 176 (1), 181 (1)—“Special Renewal License” under sec. 85 (1) (a)—Mining Commissioner—Finding of Fact—Appeal.*]—The appellant, the holder of a mining license, being at a distance from the Recorder's office, failed to have his license renewed before the 1st April, 1911; he prospected, notwithstanding, and on the 21st April made a discovery and staked two claims. On the 24th April, his license was renewed under sec. 85 (1) (a) of the Mining Act of Ontario, 8 Edw. VII. ch. 21:—*Held*, affirming the decision of the Mining Commissioner, that the appellant could acquire no rights by such a discovery and staking.—*Per RIDDELL, J.*:—Having regard to secs. 22 (1), 176 (1), and 181 (1) of the Act, what the appellant did after his license expired was a crime, and he could found no claim thereon.—*Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147, *McKinnon v. Lundy* (1893-4), 24 O.R. 132, 21 A.R. 560, *Lundy v. Lundy* (1895), 24 S.C.R. 650, specially referred to.—The “special renewal license,” under sec. 85 (1) (a), is not operative to make that rightful which was

wrongful, that innocent which was a crime, but only to save from forfeiture the interest already rightfully and lawfully acquired of “the holder of a mining claim.”—Upon the evidence, the Court declined to interfere with the finding of the Mining Commissioner in favour of the validity of the respondent's staking. *Re Sanderson and Saville*, 616.

**MISFEASANCE.**

See COMPANY, 4.

**MISTAKE.**

See COMPANY, 3—INFANT, 1—SUCCESSION DUTY.

**MORTGAGE.**

1. *Covenant for Payment Implied in Registered Charge under Land Titles Act—Action for Mortgage - money—Instrument not under Seal—Effect of Provisions of Act—Limitation of Actions—“Specialty”—Period of Limitation—Second Mortgage—Cession of Charge for Benefit of First Mortgagee—Sale under Power—Effect of, upon Right to Sue—Inability to Reconvey—Default of Mortgagor—Reservation of Rights.*]—The defendant, in 1891, created a charge upon land which had been brought under the Land Titles Act, by an instrument, not under seal, in the form given in the schedule to the Land Titles Act then in force (No. 28 in the schedule to R.S.O. 1897, ch. 138). This was a second charge or mortgage upon the land, and payment of the moneys secured was to be made in 1894. The instrument was registered under the Act. It did not in terms contain a covenant for payment of the mortgage -

money:—*Held*, that, under sec. 34 of the Act (R.S.O. 1897, ch. 138), such a covenant was implied as against the person who created the charge, completed by registration; and an action upon that covenant was not barred by the lapse of less than twenty years from the date of default, which was not earlier than 1894, being (by the effect of the Land Titles Act, though the instrument was not under seal) an action upon a "specialty," within the meaning of the Statute of Limitations, R.S.O. 1897, ch. 72, sec. 1 (b)—a covenant contained in an indenture of mortgage made before the 1st July, 1894.—Sections 13, 34, 40 (3), 41, 101, and 107 of the Land Titles Act, R.S.O. 1897, ch. 138, and sec. 102 of the Land Titles Act, 1 Geo. V. ch. 28, considered.—The second chargee, the plaintiff, in order to free the land for the benefit of the first chargee, in 1903 executed a cessation of his second charge, and that cessation was registered. By it he expressly reserved his rights against his mortgagor, the defendant, both for payment of the moneys secured by the charge and upon the covenants contained in the charge:—*Held*, that the effect of the registration of the cessation was, upon sale by the first mortgagee, to give the purchaser an absolute ownership as to the land; but it left unimpaired the right of the plaintiff to proceed for the recovery of the amount due by the mortgagor, the defendant.—Although the mortgagee suing on a covenant in the mortgage must ordinarily be in a position to reconvey the land upon payment of what is due, that does not necessarily apply to the case of a second

mortgagee whose rights against the land have been extinguished by the act of the first mortgagee. The inability of the mortgagee to convey will not bar the right of action on the covenant, if such inability arises from any default of the mortgagor. The mortgagor's duty was to pay off the first mortgage, and so prevent the exercise of the power of sale by which the equity of redemption was extinguished; and the loss of the land was occasioned, not by the action of the plaintiff in releasing his charge, but by the rights conferred upon the first mortgagee by his security, and by the default of the defendant himself.—*In re Burrell, Burrell v. Smith* (1869), L.R. 7 Eq. 399, applied and followed.—*Palmer v. Hendrie* (1860), 28 Beav. 341, distinguished. — Judgment of DENTON, Jun. Co.C.J., reversed. *Beatty v. Bailey*, 145.

2. *Equitable Mortgage — Deposit of Title Deed and Insurance Policies as Security for a Debt—Legal Estate not in Depositor—Assignee for Benefit of Creditors—Costs.*—The intent to create an equitable mortgage by delivery or deposit of writings may be established by parol evidence; and it is sufficient if only some or one of the material documents of title be so delivered.—The law in respect of such mortgages is the same in Ontario as in England.—An equitable mortgage may be created by the deposit of a deed, where the legal title is outstanding in another than the depositor of the deed.—Summary of the cases.—On conflicting evidence, it was *held*, that M. agreed to deliver to the plaintiffs a deed to him of a farm and certain insurance policies, as security for a debt, and did so deliver them.—



Although, in the circumstances of the case, the assignee for the benefit of creditors of M. was justified in disputing the claim of the plaintiffs to establish their mortgage, that did not disentitle the plaintiffs to costs. *Zimmerman v. Sproat*, 448.

See BANKS AND BANKING, 1—COMPANY, 5—DOWER.

### MUNICIPAL CORPORATIONS.

1. *Buildings "on Residential Streets" of Cities—Limitation of Distance from Line of Street—Consolidated Municipal Act, 1903, sec. 541a—By-law—Validity—Application to Building on Corner Lot—Discrimination—Unreasonableness.*]—By sec. 541a of the Consolidated Municipal Act, 1903 (added by 4 Edw. VII. ch. 22, sec. 19), councils of cities are authorised to pass and enforce by-laws to regulate and limit the distance from the line of the street in front thereof at which buildings on residential streets may be built; such distance may be varied upon different streets or in different parts of the same street. A city by-law, passed pursuant to this enactment, provided that no building should be "built or erected on the lots fronting or abutting on both sides of A. road" (a residential street) "from St. C. avenue to L. road, within a distance of 40 feet from the east and west lines of the said road." D. desired to build an apartment house at the north-east corner of St. C. avenue and A. road, with the main front and entrance on St. C. avenue, and nearer than 40 feet to the east line of A. road:—*Held*, that the by-law was within the authority of this enactment.—2. Having

regard to the natural meaning of the words "street in front thereof" and "buildings on residential streets," and to the object of the Legislature, the proposed building would be a building on A. road and within the restriction imposed by the by-law; *BRITTON, J.*, dissenting.—3. That the by-law was not discriminatory in its operation, nor so unreasonable that it should be declared invalid.—Opinion of *RIDDELL, J.*, approved. *Re Dinnick and McCallum*, 551.

2. *Local Option By-law—Voting on—Scrutiny—Scope of—Municipal Act, 1903, secs. 369-372—Votes of Tenants—Residence—Finality of Voters' Lists—Voters' Lists Act, 7 Edw. VII. ch. 4, sec. 24 (2)—Vote of Person Disentitled by Non-residence—Inquiry as to how Ballot Marked—Municipal Act, 1903, sec. 200—Deduction of Disallowed Votes from Majority in Favour of By-law.*]—A scrutiny under secs. 369-372 of the Consolidated Municipal Act, 1903, in regard to the voting upon a local option by-law, is something more comprehensive than a simple recount; and, when proceeding with a scrutiny under that section, a County Court Judge has authority to inquire whether any persons who have cast their ballots come within the excepted class mentioned in sub-sec. 2 of sec. 24 of the Ontario Voters' Lists Act; *MACLAREN and MEREDITH, JJ.A.*, dissenting.—Upon such a scrutiny, it is competent for the County Court Judge to declare void the vote of a person voting as a tenant who has cast a ballot, when it appears that, although his name was on the certified list, he was not, when it was placed thereon, resident and has not

since become resident within the municipality to which the list relates—within the very terms of sub-sec. 2, above referred to, he is not and has not been resident within the municipality to which the list relates; MACLAREN and MEREDITH, JJ.A., dissenting. — Upon such a scrutiny, the County Court Judge has no power to inquire how any person who was not entitled to vote, marked his ballot: Municipal Act, 1903, sec. 200.—And the County Court Judge should deduct the disallowed votes from the affirmative votes.—Review of the previous decisions upon these questions.—*In re Local Option By-law of the Township of Saltfleet* (1908), 16 O.L.R. 293, and *Re Orangeville Local Option By-law* (1910), 20 O.L.R. 476, specially considered.—Judgment of a Divisional Court, 25 O.L.R. 267, reversed. *Re West Lorne Scrutiny*, 339.

See HIGHWAY—ONTARIO RAILWAY AND MUNICIPAL BOARD — STREET RAILWAYS.

### MUNICIPAL ELECTIONS.

*Township Councillor and Deputy Reeve — Qualification — Transfers of Qualifying Properties after Election—Right to Hold Seats—Qualification as Mortgagees—Defect in Declarations—Right to Make Fresh Declarations—Consolidated Municipal Act, 1903, secs. 76, 219, 220, 311—Procedure in Attacking Right to Hold Seats—Notice of Motion in Nature of Quo Warranto — Time—Amendment.]* —The respondents were declared elected councillor and deputy reeve respectively of a township. Both had been assessed as freeholders, and were admittedly qualified at the time of the election. The councillor elect made

an absolute conveyance of his qualifying property, delivered and registered before the 8th January, on which day he made a declaration of qualification purporting to be in pursuance of sec. 311 of the Consolidated Municipal Act, 1903, and took his seat as councillor. The declaration omitted the word “and” between the words “have” and “had” in the third line of the form in the statute, sec. 311—thus reading “I *have had* to my own use and benefit . . . at the time of my election . . . such an estate as does qualify me,” etc. The deputy reeve elect also disposed of his only qualifying property; but this occurred after he made the declaration and took his seat. The declaration was in the same defective form. The councillor elect took as part of the purchase-money of his property a mortgage thereon for \$4,100, and the deputy reeve elect took a mortgage in the same way for \$4,500:—*Held*, that the statute lays down three prerequisites to a *de jure* occupation of the office: (1) possession of property qualification; (2) election by acclamation or otherwise; (3) making the declaration prescribed; and absence of any one of these will prevent the seat being filled *de jure*.—And *held*, that the declarations made by the respondents were not in the form nor to the same effect as the form prescribed by the statute; and neither respondent was *de jure* a member of the council.—*Held*, also, that the relator had the right to proceed by notice of motion in the nature of a *quo warranto*, under secs. 219 and 220 of the Municipal Act, 1903, to attack the right of the respon-

dents to hold their seats.—*Held*, also, that, as the facts in regard to the transfers of the properties and the form of the declaration came to the knowledge of the relator only within six weeks of the application, he was in time under the amendment made to sec. 220 of the Act of 1903, by 7 Edw. VII. ch. 40, sec. 5.—*Held*, also, that the notices of motion should be amended by setting up the omission to make the statutory declaration.—*Held*, also, that, if the respondents could now make the declaration required by sec. 311 of the Act, they should be allowed to do so, and so make their occupancy of the offices *de jure*.—*Regina ex rel. Clancy v. Conway* (1881), 46 U.C.R. 85, followed.—*Held*, also, that the respondents, as mortgagees holding the legal estate in the lands which they had conveyed, although not mortgagees in possession, had the qualification required by sec. 76 of the Consolidated Municipal Act, 1903—there is nothing in principle or authority to prevent a mortgagee who is assessed for the property qualifying on his legal estate.—History of the legislation and review of the authorities. *Rex ex rel. Morton v. Roberts*, *Rex ex rel. Morton v. Rymal*, 263.

### NECESSARIES.

See HUSBAND AND WIFE, 2.

### NEGLIGENCE.

See RAILWAY, 1, 2, 3.

### NEXT FRIEND.

See INSURANCE, 4.

### NOTICE.

See COMPANY, 5 — CRIMINAL LAW, 4.

### OBSCENE BOOKS.

See CRIMINAL LAW, 1.

### ONTARIO RAILWAY AND MUNICIPAL BOARD.

*Jurisdiction — Separate Telephone Systems in Adjacent Territories—Order for Connection and Inter-communication and Construction and Operation of Switch-board and Trunk Line—Ontario Telephone Act, 1910—Agreement with Bell Telephone Company Approved by Board—Applications to Board — Parties — Township Corporation — “Municipal Telephone System” — Power of one Member of Board to Make Order.* — The Corporation of the Village of Brussels applied to the Ontario Railway and Municipal Board for an order compelling “The McKillop Municipal Telephone System” to establish connection, intercommunication, joint operation, reciprocal use, and transmission of business between the applicants’ and the respondents’ telephone systems; and the Board made an order accordingly, and by a subsequent order refused to rescind it; from which orders the township corporation, representing the subscribers to the township telephone system, appealed. The first order required the appellants to build and operate a switch-board and a trunk telephone line. It appeared that the appellants were operating under an agreement made between them and the Bell Telephone Company, substantially for the purposes recognised and authorised by sec. 8 of the Ontario Telephone Act, 1910, which agreement had been approved by the Board prior to the application made by the village corporation:—*Held*, that the result of obedience to the order appealed



against would be to alter or vary the relations based upon the agreement with the Bell Telephone Company approved by the Board; and the Board had no jurisdiction to do that, unless upon an application for the purpose with proper parties before it.—*Held*, also, that the order made (involving a large expenditure) was not, even apart from the agreement with the Bell Telephone Company, authorised by any of the provisions of the Act; MACLAREN, J.A., expressing no opinion as to this; and MAGEE, J.A., inclining to the contrary opinion.—*Per* MOSS, C.J.O., and MEREDITH, J.A.:—The application should have been made against the township corporation, not against the “system,” which was not a legal entity.—*Per* MEREDITH, J.A.:—There was no power in one member of the Board to hear the application and make the order; and the Bell Telephone Company should have been given an opportunity to be heard upon the application.—Orders of the Board set aside for want of jurisdiction.—An order of similar purport made by the Board upon the application of the Corporation of the Village of Blyth was also set aside. *Re Village of Brussels and McKillop Municipal Telephone System, Re Village of Blyth and Township of McKillop*, 29.

See STREET RAILWAYS.

## ORIGINATING NOTICE.

See WILL, 4.

## PARENT AND CHILD.

See INFANT, 2.

## PARTIES.

See COMPANY, 5—ONTARIO

## RAILWAY AND MUNICIPAL BOARD.

### PARTNERSHIP.

*Account—Profits of Separate Business Carried on by one Partner—Assent of other Partner—“Competing” Business—Sale of Property of Firm after Death of one Partner—Purchase by Trustee for Surviving Partner—Adequacy of Price—Liability to Account for Profits on Resale—Allowance to Surviving Partner for Services in Liquidation—Trustee Act, sec. 40—Trustee—Express Trustee.*]

One of two members of a partnership carrying on business in Ontario was interested as a partner in a similar business carried on in Michigan:—*Held*, that the irresistible inference from the facts in evidence was, that what was done by the one partner was done with the assent and approval of the other; and, therefore, the rule of law laid down by Lindley, L.J., in *Aas v. Benham*, [1891] 2 Ch. 244, 255, “that if a partner without the consent of his copartners carries on a business of the same nature as, and competing with, that of the firm, he must account for and pay over to the firm all profits made by him in that business,” had no application. — *Quære*, whether the Michigan business was a “competing” business, within the meaning of the rule.—*Held*, also, that the finding of a Referee upon a reference for the taking of the accounts of the partnership, after the death of one of the partners, that the sale of an oil mill owned by the firm to a brother-in-law of the defendant (the surviving partner), was provident, and the price realised was as much as the mill was worth, was well warranted by



the evidence.—*Held*, also, upon the evidence, affirming the finding of the Referee, that the surviving partner was, in truth, the purchaser, and that his brother-in-law was a mere trustee for him.—*Held*, however, in thus reversing the conclusion of the Referee, that the defendant was not liable to account for profits realised when the oil mill was afterwards sold with the other assets of a company formed to carry on an oil business, to which the mill was turned over; he was liable to account for the real value of the property which he had improperly purchased; but that was the extent of his liability; and the finding that the property sold for its full value was conclusive.—*Held*, also, reversing the finding of the Referee, that the defendant was not entitled to an allowance for his services in connection with the liquidation of the partnership.—Section 40 of the Trustee Act, R.S.O. 1897, ch. 129, applies only to express trustees; and, *semble*, a surviving partner is not a trustee at all. *Livingston v. Livingston*, 246.

See PROMISSORY NOTES.

### PAYMENT.

See HUSBAND AND WIFE, 2—  
WATER AND WATERCOURSES.

### PAYMENT INTO COURT.

See SURREGATE COURTS.

### PENALTY.

See CONSTITUTIONAL LAW.

### PERPETUITY.

See WILL, 2, 4.

### PHYSICIANS AND SURGEONS.

See PUBLIC HEALTH ACT.

### POLICE MAGISTRATE.

See COSTS—CRIMINAL LAW, 3.

### PRACTICE.

*Consolidation and Stay of Actions—Common Defendant—Distinct Claims of Different Plaintiffs—Damages—Directions as to Trial.*—Four different plaintiffs brought separate actions against the same defendants; the cause of action in each case was injury to the premises of the plaintiff by the spread of fire negligently set out by the defendants upon their land and negligently permitted to spread to the plaintiff's land:—*Held*, affirming the order of the Master in Chambers, that there could not be consolidation of the actions, upon the application of the defendants, either in the strict sense of the word "consolidation," as used in Con. Rule 435, or in the looser sense, as where one of the actions is selected as a test action, and the trial of the others stayed until it has been finally determined. The issues in the four cases, though similar, were quite distinct. And a plaintiff cannot be compelled to tie up his case with those of the other plaintiffs, without his consent.—*Lee v. Arthur* (1908), 100 L.T.R. 61, *Westbrook v. Australian Royal Mail Steam Navigation Co.* (1853), *Mail Steam Navigation Co.* (1853), 23 L.J.N.S.C.P. 42, and *Williams v. Township of Raleigh* (1890), 14 P.R. 50, applied and followed.—Although a consolidating order was refused, a direction was given that the four actions should be entered for trial at the same sittings, in order that the trial Judge might make such arrangements as would prevent unnecessary repetition of evidence.—Consideration of the

practice in regard to the consolidation and stay of actions. *Kuula v. Moose Mountain Limited*, 332.

See ATTACHMENT OF DEBTS—COSTS — DISCOVERY — JUDGMENT DEBTOR — MUNICIPAL ELECTIONS — PROHIBITION — RAILWAY, 2 — SURROGATE COURTS — TRIAL.

### **PRESCRIPTION.**

See WATER AND WATER-COURSES.

### **PRESSURE.**

See CONTRACT, 2.

### **PRINCIPAL AND AGENT.**

*Agent's Commission on Sale of Land — Contract — Time-limit — Sale Effected after Expiry — Introduction of Purchaser by Agent.*]—To entitle an agent to a commission or remuneration for his services in bringing about a sale of land for his principal, the mere finding of a purchaser is not enough; there must be a contract to pay; and the terms of the contract, including all limitations as to time, must govern.—On a Saturday, the defendants put their land in the hands of the plaintiff, a land agent, for sale at \$50,000, upon what was called an exclusive agency or option, which was limited in time and would expire on the following Monday at two o'clock. The defendants afterwards extended the time till the following day, but the plaintiff failed to find a purchaser. Subsequently the defendants sold the land, for \$50,000, to G. and another. G.'s attention had been directed to the land by the plaintiff, who had endeavoured to procure G. to

make one of a syndicate to buy the land. G. had begun negotiations with the defendants after the expiry of the original time-limit but before the expiry of the extended time:—*Held*, that the plaintiff was not entitled to recover in an action for commission on the sale to G. and his associate.—*Burchell v. Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614, and *Stratton v. Vachon* (1911), 44 S.C.R. 395 distinguished. *Sibbitt v. Carson*, 585.

2. *Agent's Commission on Sale of Land—Employment of Agent to Find Purchaser—Vendor and Purchaser Brought together by Intervention of Agent—Sale Effected by Vendor without Knowledge of Agent's Introduction to Purchaser.*]—Where the defendant employed the plaintiffs, who were brokers, to sell his property, and imposed no time-limit, and never revoked their authority to find a purchaser, and the plaintiffs brought the property to the notice of one who became the purchaser, though the negotiations were not conducted by the plaintiffs, and the defendant, when he closed the transaction, did not know that the plaintiffs had brought the property to the notice of the purchaser:—*Held*, that the plaintiffs were entitled to a commission upon the sale-price.—Review of the authorities.—*Wilkinson v. Alston* (1879), 48 L.J.Q.B. 733, applied and followed.—*Locators v. Clough* (1908), 17 Man. L.R. 659, disapproved.—Judgment of DENTON, Jun. Co. C.J., York, reversed. *Rice v. Galbraith*, 43.

See CONTRACT, 3—HUSBAND AND WIFE, 2—VENDOR AND PURCHASER, 1.

**PRIVILEGE.**

See SLANDER.

**PROCLAMATION.**

See CONSTITUTIONAL LAW.

**PRODUCTION OF DOCUMENTS.**

See DISCOVERY.

**PROHIBITION.**

*County Court Judge—Jurisdiction—Convictions under Inspection and Sale Act, R.S.C. 1906, ch. 85, sec. 321—Appeal to County Court under sec. 335—Time for Hearing and Decision—Extension—Powers of Judge—Costs of Appeal—Criminal Code, R.S.C. 1906, ch. 146, sec. 751—Taxation by Clerk of County Court—Adoption by Judge—Amendment of Order—Sessions Practice—Discretion.*—On the 11th January, 1910, the defendant was convicted by a Police Magistrate of three offences against sec. 321 of the Inspection and Sale Act, R.S.C. 1906, ch. 85. On the 17th January, the defendant appealed, under sec. 335 of the Act, to a County Court; the appeal came before the Judge of the County Court on the 7th February; and, upon that day, the Judge made an order extending for ten days the time for hearing the appeal. On the 17th February, the hearing was enlarged to the 17th March; again, to the 22nd March; and upon the 22nd March and 23rd March the appeal was heard. After argument, judgment was reserved; and on the 30th April judgment was given and an order made dismissing the appeal and affirming the convictions, "with costs to be paid by the appellant to the respondent; such costs to be taxed according to the scale

of costs taxable in this Court, and such costs to be taxed by the clerk of this Court." The respondent's costs were taxed by the clerk on the 16th June, against the defendant's protest. The defendant moved before a Judge of the High Court for an order prohibiting the respondent and the County Court Judge and clerk from taking any further proceedings, upon the grounds: (1) that the Judge, when he made the order, was *functus officio*; (2) that the decision was not given within thirty days from the date of conviction, nor was the time for hearing and decision extended, as required by sub-sec. 2 of sec. 335; (3) that the Judge did not find the amount of costs, but directed the costs to be taxed by the clerk; (4) that the Judge, having made his final order without fixing the costs, was *functus officio*; (5) that the clerk had no jurisdiction to tax the costs.—The motion for prohibition came before SUTHERLAND, J., who ordered that it should be enlarged for ten days, to enable the respondent to apply to the County Court Judge to amend his order by himself fixing the amount of costs, and dismissed in the event of that course being taken:—*Held*, affirming the order of SUTHERLAND, J., that the County Court Judge was not *functus officio*; and that the case was not one for prohibition.—History of the legislation upon the subject of the costs of appeals from convictions and review of the authorities.—*Per RIDDELL, J.*:—The order extending the time to ten days after the 7th February, that is, to the 17th February, more than thirty days after the conviction, made the time wholly at large and wholly in the dis-



cretion of the Judge. The extension of the time for hearing the appeal was an extension of the time for decision as well; and the order of the 7th February was an order extending "the time for hearing and decision," under sec. 335 (2). As there is no time-limit or limit to any particular sittings, the Court is not *functus officio* until everything is done which should be done.—The very most that could be said was, that the Judge had not stamped the amount of costs with his approval, and caused that amount to be inserted in the order. Prohibition is not *ex debito justitiæ*—it is an extreme measure; and it would be absurd to prohibit the Judge from acting upon an order which he could make right with a few strokes of the pen.—Distinction between cases arising out of appeals to the Sessions and this appeal to a County Court, pointed out.—*Semble*, that the word "costs," as used in sec. 751 of the Criminal Code, R.S.C. 1906, ch. 146, providing that "the Court to which such appeal is made shall . . . make such order therein, with or without costs to either party, including costs of the Court below, as seems meet to the Court," would mean, in the case of an appeal to a County Court, costs taxable between party and party in the County Court.—At all events, there was such doubt in fact and law whether the inferior Court was exceeding its jurisdiction or acting without jurisdiction, that the High Court should exercise its discretion to refuse a prohibition. *Re Rex v. Hamlink*, 381.

#### PROMISSORY NOTES.

*Endorsement to Bank by Cus-*

*tomers before Maturity—Purpose of—Collection or Collateral Security—Lien of Bank for Amount Owed by Customer—Fresh Indebtedness when Note Overdue—Failure of Consideration between Original Parties—Purchase of Share in Partnership—Part Failure of Consideration.*—The judgment of a Divisional Court, 23 O.L.R. 502, was reversed and the judgment of BOYD, C., restored; MACLAREN, J.A., dissenting. — *Per* MOSS, C.J.O.:—Even if the promissory note sued on was endorsed to the plaintiffs merely for collection, and not as collateral security, the plaintiffs were still entitled to the judgment awarded to them by BOYD, C. As endorsees for collection, they were entitled to a lien on the note for debts that were then presently payable and from time to time thereafter becoming payable. When the note was received by the plaintiffs, it was a note for good consideration, not overdue. The defendants became parties to the note as sureties for L. upon a transaction between him and F. for the acquisition by L. of a half share in the business of F. and the formation of a partnership between them. The partnership was in fact created; and its subsequent termination would not bring about a total failure of consideration so as to affect the validity of the note in the hands of either F. or the plaintiffs. Upon taking the partnership accounts, L. might be able to shew himself entitled to a return of part of the premium; but it was for the defendants to shew this, if they wished to avail themselves of the defence of part failure of consideration; and they had not shewn it.—*Per* MEREDITH, J.A.:



—The proper conclusion upon the facts is, that the note was taken and always held by the plaintiffs as security for the repayment of all that might from time to time be owing by F. to the plaintiffs. And, that being so, the note was good, in the plaintiffs' hands, against the makers of it, for the amount of the indebtedness of F. to the plaintiffs; the fact that at some times there was nothing due from F. to the plaintiffs would not cut out that right or deprive the plaintiffs of the position of a holder in due course; there would not be by implication a new transfer of the note as security for each separate indebtedness or advance; there would be but the one transaction, to which all changes in the account between F. and the plaintiffs would be referable; everything would relate back to the one transfer made while the note was current; although it was competent for F. to take up the note at any time when there was no obligation on his part to the plaintiffs. — *Atwood v. Crowdie* (1816), 1 Stark. 483, followed.—*Per* MACLAREN, J.A.:—The note was left with the plaintiffs "for what it was worth," without any special pledging or hypothecation; and the right which the plaintiffs had under their banker's lien was the right to retain the note for any debt due to them; they had no right to retain it for any liability not yet due or payable. The legal position of the plaintiffs was the same as though they had returned the note to F. when there was nothing owing by him, and he had redelivered it to them when he again became indebted to them, it being then overdue, and so taken subject to all the

equities between the makers and F.; and there was such a failure of consideration as between F. and L. as would prevent the plaintiffs from recovering. — *Atwood v. Crowdie*, *supra*, explained. *Merchants Bank of Canada v. Thompson*, 183.

## PROPERTY RIGHTS.

*See* CHURCH.

## PUBLIC HEALTH ACT.

*Services of Physician Employed by Local Board of Health—Remuneration—Action for—Mandatory Order—Liability—Proper Remedy—Prerogative Writ of Mandamus—Order under Con. Rule 1091—Jurisdiction of County Court—Reasons for Judgment—Costs.*]—The members of a Local Board of Health are not, under the Public Health Act, R.S.O. 1897, ch. 248, constituted a corporation; and the Board as a whole is not personally liable nor are the members individually liable to be sued for the recovery of a medical claim as a private debt. The remedy is to be sought against the Board as a public body, by seeking the grant of a writ of mandamus requiring the Board to issue an order upon the municipality for the amount of the claim.—*Bibby v. Davis* (1902), 1 O.W.R. 189, not followed.—*Sellars v. Village of Dutton* (1904), 7 O.L.R. 646, and *Ross v. Township of London* (1910-11), 20 O.L.R. 578, 23 O.L.R. 74, followed.—The writ is the prerogative writ of mandamus; and the order substituted therefor may now be issued by any of the Divisions of the High Court, but not by an inferior Court, and is issued upon summary application: Con. Rule 1091.—The man-

damus which may be awarded in an action is either in the nature of the old equitable mandatory injunction, or is merely ancillary to the enforcement of a legal right for which an action may be maintained at law.—Judgment of the County Court of Dufferin affirmed, with a variation as to costs.—*Per* BOYD, C.:—Reasons for the judgment below should have been given. *Rich v. Melancthon Board of Health*, 48.

### PUBLICATION.

See SLANDER.

### QUALIFICATION.

See MUNICIPAL ELECTIONS.

### QUO WARRANTO.

See MUNICIPAL ELECTIONS.

### RAILWAY.

1. *Carriage of Live Stock and Person in Charge—Half Fare Privilege—Injury to Person—Negligence—Liability—Exemption—Contract with Shipper—Absence of Privity and Knowledge of Person Injured.*—The plaintiff was injured while travelling on a train of the defendants, by the defendants' admitted negligence. He was travelling at half fare in charge of a horse shipped by P., under a contract made between P. and the defendants, not read or signed by the plaintiff. The form of contract signed was authorised by the Board of Railway Commissioners of Canada, and provided that, "in case of the company granting to the shipper or any nominee . . . of the shipper a pass or privilege at less than full fare to ride on the train on which the property is being carried . . . as to every person so travelling on

such a pass or reduced fare the company is to be entirely free from liability in respect of his death, injury, or damage, and whether it be caused by the negligence of the company, or its servants or employees, or otherwise howsoever:"—*Held*, that the plaintiff was not bound by the contract; and was entitled to recover in an action for damages for the defendants' negligence.—*Bicknell v. Grand Trunk R.W. Co.* (1899), 26 A.R. 431, and *Sutherland v. Grand Trunk R.W. Co.* (1909), 18 O. L. R. 139, distinguished.—*Dicta* of MEREDITH, J.A., in *Goldstein v. Canadian Pacific R.W. Co.* and *Robinson v. Canadian Pacific R.W. Co.* (1911), 23 O.L.R. 536, 542, 543, not followed. *Robinson v. Grand Trunk R.W. Co.*, 437.

2. *Crossing of one Railway by another—Interlocking Plant—Signalman—Negligence—Liability of Employer—company—Master and Servant—Action against both Companies—Judgment—Leave to Appeal.*—*Held*, reversing the judgment of BOYD, C., 24 O.L.R. 482, that the signalman at the point of crossing of the tracks of the two defendant companies, whose negligence caused the death of the plaintiff's husband, was the servant, not of the Canadian Pacific Railway Company, but of the Canadian Northern Railway Company, and that company was liable for his negligent act; GARROW, J.A., dissenting.—The Canadian Pacific Railway Company having successfully appealed from the judgment given against it, the plaintiff was allowed to appeal as against the Canadian Northern Company and to have judgment against

that company. *Pattison v. Canadian Pacific R.W. Co.*, 410.

3. *Injury to Brakesman — Foreign Box Freight Car — Appliances for Coupling—Dominion Railway Act, secs. 264, 317 — Interchange of Traffic—Negligence—Evidence—Jury.*] — The plaintiff, who had had experience as a railway brakesman, was acting as brakesman on a freight train of the defendants, when it became his duty to effect a coupling between a freight box car, part of the train referred to, which car (called the Wabash car) did not belong to the defendants, but had been received by them from a foreign railway company in the ordinary course of interchange of traffic, pursuant to sec. 317 of the Railway Act, R.S.C. 1906, ch. 37, and another car. The Wabash car was provided with automatic couplers; but, while it had a ladder at the side, near the end, it had no ladder on the end, as required by sec. 264 (5) of the Act. When the engine was moving the Wabash car towards the other car, the plaintiff, observing that the knuckle and coupler were closed, went down the ladder on the side of the Wabash car, near the end which was approaching the other car, with the intention of getting hold of the coupler-rod to open the knuckle so as to receive the coupler of the other car. He went to the bottom step, and, with his left foot resting on it, and holding on to the lowest rung of the ladder with his left hand, endeavoured to reach round the end of the car to the coupler-rod. While he was in this position, the moving car passed over a crossing, and the jar caused his foot to slip from the bottom step, and he fell with his arm under the

wheels. In an action for damages for his injuries:—*Held*, that what befell the plaintiff was not due to the absence of a ladder at the end of the car, nor to the insufficient length of the coupler-rod; but to the plaintiff not having taken the proper course, viz., to signal the engine-driver to stop, and then get down and make the coupling from the ground, which he could have done; that there was no negligence on the part of the defendants; and no evidence to sustain such of the findings of the jury as were in favour of the plaintiff.—*Per* MÓSS, C. J. O.:—The obligation of sub-sec. (5) of sec. 264 of the Railway Act is confined to cars "of the company;" and the absence of end ladders on the Wabash car was not a contravention of the obligation. *Stone v. Canadian Pacific R.W. Co.*, 121.

*See* CONSTITUTIONAL LAW—  
CONTRACT, 4 — STREET RAIL-  
WAYS.

### RATIFICATION.

*See* CONTRACT, 3.

### REFERENCE.

*See* COMPANY, 2.

### RELIGIOUS INSTITUTIONS ACT.

*See* CHURCH.

### RENEWAL OF LEASE.

*See* CONTRACT, 2.

### RENEWAL OF LICENSE.

*See* MINES AND MINERALS.

### RESTRAINT ON ALIENATION.

*See* WILL, 4.

**RETURN.***See* COMPANY, 1.**REVENUE.***See* SUCCESSION DUTY.**REVOCATION.***See* WILL, 1.**RIVER.***See* WATER AND WATER-COURSES.**RULES.**Con. Rule 162.]—*See* ATTACHMENT OF DEBTS.Con. Rule 490.]—*See* DISCOVERY.Con. Rule 435.]—*See* PRACTICE.Con. Rule 902.]—*See* JUDGMENT DEBTOR.Con. Rules 911 *et seq.*]—*See* ATTACHMENT OF DEBTS.Con. Rule 1091.]—*See* PUBLIC HEALTH ACT.**SALE OF LAND.***See* DOWER—PRINCIPAL AND AGENT — VENDOR AND PURCHASER—WILL, 2.**SALE OF OBSCENE BOOKS.***See* CRIMINAL LAW, 1.**SALE OF TIMBER.***See* CONTRACT, 3.**SCRUTINY.***See* MUNICIPAL CORPORATIONS, 2.**SEAL.***See* MORTGAGE, 1.**SEARCH WARRANT.***See* CRIMINAL LAW, 3.**SECURITIES.***See* BANKS AND BANKING.**SEPARATION DEED.***See* HUSBAND AND WIFE, 1.**SERVICE OF PAPERS.***See* ATTACHMENT OF DEBTS.**SESSIONS.***See* PROHIBITION.**SHARES.***See* COMPANY, 3.**SHERIFF.***See* COMPANY, 1—CRIMINAL LAW, 4.**SHIP.***See* COMPANY, 2.**SLANDER.**

*Words Spoken of Plaintiff in Reference to his Trade—Publication—Speaking Brought about by Action of Plaintiff—Publication—Evidence for Jury—Privileged Occasion—Absence of Belief in Truth of Words—Malice—Damages—Quantum.*]—In an action for defamatory words alleged to have been spoken by the defendant of the plaintiff in the way of his trade, the plaintiff testified that, having learned that statements injuriously affecting him were in circulation, and being unable to trace them to their source, he employed two detectives "for the purpose of ascertaining the facts and getting information for his solicitors." The detectives, having made the acquaintance of the defendant, told him that they were going to erect a club house, and that the plaintiff was anxious to secure the contract for building it. It was upon what the defend-



ant then said that the action was based:—*Held*, that, although the speaking of the words was brought about by the action of the plaintiff, there was evidence of publication for the jury.—Review of the authorities.—*Duke of Brunswick v. Harmer* (1849), 14 Q.B. 185, followed.—*Held*, also, that, although the occasion on which the words were spoken was privileged, there was evidence, which the jury believed, that there was no truth in the statements made by the defendant; and evidence that he knew that they were untrue, or that he made them recklessly, not caring whether they were true or false; and evidence from which malice might be inferred.—*Held*, also, that, while the damages assessed by the jury (\$1,000) were substantial, they were not, in view of the defendant's conduct throughout and his not having gone into the box to testify on his own behalf, so excessive as to warrant the Court in setting aside the verdict.—Judgment of BRITTON, J., upon the verdict of a jury, affirmed. *Rudd v. Cameron*, 154.

### SPECIALTY.

See MORTGAGE, 1.

### SPECIFIC PERFORMANCE.

See VENDOR AND PURCHASER, 2.

### STATUTE OF FRAUDS.

See CONTRACT, 3 — VENDOR AND PURCHASER, 2.

### STATUTE OF LIMITATIONS.

See HUSBAND AND WIFE, 2—MORTGAGE, 1.

### STATUTES (CONSTRUCTION OF).

See CHURCH — COMPANY — CONSTITUTIONAL LAW — CONTRACT, 2—INFANT, 1—JUDGMENT DEBTOR—MORTGAGE, 1—MUNICIPAL CORPORATIONS — ONTARIO RAILWAY AND MUNICIPAL BOARD — PROHIBITION—RAILWAY, 3—STREET RAILWAYS—SURROGATE COURTS—WATER AND WATER-COURSES.

### STATUTES (REFERRED TO).

12 Car. II. ch. 24, sec. 8 (Infants Act).

See INSURANCE, 4.

33 & 34 Vict. ch. 23 (Imp.) (Forfeiture Act).

See CONTRACT, 2.

36 Vict. ch. 65, sec. 1 (D.) (Navigable Waters Protection Act).

See WATER AND WATERCOURSES.

36 Vict. ch. 135, secs. 7, 19 (O.) (Religious Institutions Act).

See CHURCH.

42 Vict. ch. 22, secs. 1, 2 (O.) (Dower in Mortgaged Lands).

See DOWER.

49 Vict. ch. 36, sec. 7 (D.) (Navigable Waters Protection Act).

See WATER AND WATERCOURSES.

R.S.C. 1886, ch. 91, sec. 7 (Navigable Waters Protection Act).

See WATER AND WATERCOURSES.

53 Vict. ch. 31, sec. 74, sub-sec. 2 (D.) (Bank Act).

See BANKS AND BANKING, 2.

58 Vict. ch. 25, sec. 3 (O.) (Dower in Mortgaged Lands).

See DOWER.

R.S.O. 1897, ch. 33, sec. 35 (Limitations Act).

See WATER AND WATERCOURSES.

R.S.O. 1897, ch. 51, sec. 103 (Judicature Act).

See TRIAL.

R.S.O. 1897, ch. 129, sec. 40 (Trustee Act).

See PARTNERSHIP.

R.S.O. 1897, ch. 138, sec. 13, 34, 40 (3), 41, 101, 107 (Land Titles Act).

See MORTGAGE, 1.

R.S.O. 1897, ch. 142, secs. 4, 6 (Act for Protecting the Public Interest in Rivers Streams and Creeks).

See WATER AND WATERCOURSES.

R.S.O. 1897, ch. 148, secs. 2, 5, 23 (Bills of Sale and Chattel Mortgage Act).

See COMPANY, 5.

- R.S.O. 1897, ch. 148, sec. 38 (Bills of Sale and Chattel Mortgage Act).  
*See* COMPANY, 2.
- R.S.O. 1897, ch. 191, secs. 10, 33, 37 (Companies Act).  
*See* COMPANY, 3.
- R.S.O. 1897, ch. 203, sec. 144 (Insurance Act).  
*See* INSURANCE, 2.
- R.S.O. 1897, ch. 203, secs. 147, 15, (3) (Insurance Act).  
*See* INSURANCE, 4.
- R.S.O. 1897, ch. 205 (Loan Corporations Act).  
*See* JUDGMENT DEBTOR.
- R.S.O. 1897, ch. 211, sec. 12 (Benevolent and Provident Societies Act).  
*See* INSURANCE, 4.
- R.S.O. 1897, ch. 248 (Public Health Act).  
*See* PUBLIC HEALTH ACT.
- R.S.O. 1897, ch. 307, sec. 23 (Religious Institutions Act).  
*See* CHURCH.
- R.S.O. 1897, ch. 340, sec. 2 (Infants Act).  
*See* INFANT, 2.
- 3 Edw. VII. ch. 19, secs. 76, 219, 220, 311 (O.) (Municipal Act).  
*See* MUNICIPAL ELECTIONS.
- 3 Edw. VII. ch. 19, secs. 200, 369, 372 (O.) (Municipal Act).  
*See* MUNICIPAL CORPORATIONS, 2.
- 3 Edw. VII. ch. 19, sec. 541 a (O.) (Municipal Act).  
*See* MUNICIPAL CORPORATIONS, 1.
- 3 Edw. VII. ch. 19, sec. 622 (O.) (Municipal Act).  
*See* HIGHWAY.
- 4 Edw. VII. ch. 22, sec. 19 (O.) (Amending Municipal Act).  
*See* MUNICIPAL CORPORATIONS, 1.
- 4 Edw. VII. ch. 32 (D.) (Amending Railway Act).  
*See* CONSTITUTIONAL LAW.
- 6 Edw. VII. ch. 30, sec. 57, (6) (O.) (Railway Act).  
*See* STREET RAILWAYS.
- 6 Edw. VII. ch. 30, sec. 193 (O.) (Railway Act).  
*See* CONSTITUTIONAL LAW.
- R.S.C. 1906, ch. 29, sec. 88 (Bank Act).  
*See* BANKS AND BANKING, 2.
- R.S.C. 1906, ch. 29, sec. 90 (Bank Act).  
*See* BANKS AND BANKING, 1.
- R.S.C. 1906, ch. 29, sec. 95 (Bank Act).  
*See* INFANT, 1.
- R.S.C. 1906, ch. 37, sec. 9 (Railway Act).  
*See* CONSTITUTIONAL LAW.
- R.S.C. 1906, ch. 37, secs. 264, 317 (Railway Act).  
*See* RAILWAY, 3.
- R.S.C. 1906, ch. 85, secs. 321, 335 (Inspection and Sale Act).  
*See* PROHIBITION.
- R.S.C. 1906, ch. 115, sec. 19 (Navigable Waters Protection Act).  
*See* WATER AND WATERCOURSES.
- R.S.C. 1906, ch. 119, sec. 48, 165 (Bills of Exchange Act).  
*See* INFANT, 1.
- R.S.C. 1906, ch. 144, sec. 22 (Winding-up Act).  
*See* COMPANY, 1.
- R.S.C. 1906, ch. 146, sec. 207 (Criminal Code).  
*See* CRIMINAL LAW, 1.
- R.S.C. 1906, ch. 146, secs. 225, 228, 825, 871, 873 (Criminal Code).  
*See* CRIMINAL LAW, 4.
- R.S.C. 1906, ch. 146, secs. 405, 405A, 1019 (Criminal Code).  
*See* CRIMINAL LAW, 2.
- R.S.C. 1906, ch. 146, secs. 641, 642, 773, 774 (Criminal Code).  
*See* CRIMINAL LAW, 3.
- R.S.C. 1906, ch. 146, secs. 689, 1407 (Criminal Code).  
*See* COSTS.
- R.S.C. 1906, ch. 146, sec. 751 (Criminal Code).  
*See* PROHIBITION.
- R.S.C. 1906, ch. 146, sec. 1033 (Criminal Code).  
*See* CONTRACT, 2.
- 7 Edw. VII. ch. 4, sec. 24 (2) (O.) (Voters' Lists Act).  
*See* MUNICIPAL CORPORATIONS, 2.
- 7 Edw. VII. ch. 10, sec. 11 (1) (O.) (Succession Duty Act).  
*See* SUCCESSION DUTY.
- 7 Edw. VII. ch. 34, sec. 88 (O.) (Companies Act).  
*See* COMPANY, 4.
- 7 Edw. VII. ch. 34, sec. 94 (O.) (Companies Act).  
*See* COMPANY, 1.
- 7 Edw. VII. ch. 40, sec. 5 (O.) (Amending Municipal Act).  
*See* MUNICIPAL ELECTIONS.
- 7 & 8 Edw. VII. ch. 18, sec. 6 (D.) (Amending Criminal Code).  
*See* CRIMINAL LAW, 2.
- 8 Edw. VII. ch. 21, secs. 22 (1), 85 (1) (a), 176 (1), 181 (1) (O.) (Mining Act).  
*See* MINES AND MINERALS.
- 8 & 9 Edw. VII. ch. 9 (D.) (Amending Criminal Code).  
*See* CRIMINAL LAW, 1, 3, 4.
- 9 Edw. VII. ch. 37, sec. 7 (O.) (Lunacy Act).  
*See* LUNATIC.

9 & 10 Edw. VII. ch. 120 (D.) (Incorporating London and Lake Erie Transportation Company).

See CONSTITUTIONAL LAW.

10 Edw. VII. ch. 34, sec. 35 (O.) (Limitations Act).

See WATER AND WATERCOURSES.

10 Edw. VII. ch. 84, sec. 8 (Telephone Act).

See ONTARIO RAILWAY AND MUNICIPAL BOARD.

1 Geo. V. ch. 20 (O.) (Amending Lunacy Act).

See LUNATIC.

1 Geo. V. ch. 26, sec. 37 (2) (O.) (Trustee Act).

See SURREGATE COURTS.

1 Geo. V. ch. 28, sec. 102 (Land Titles Act).

See MORTGAGE, 1.

1 Geo. V. ch. 35, sec. 3 (O.) (Infants Act).

See INFANT, 2—INSURANCE, 4.

## STAY OF PROCEEDINGS.

See PRACTICE.

## STREAM.

See WATER AND WATERCOURSES.

## STREET RAILWAYS.

*Interchange of Traffic—Ontario Railway Act, 1906, sec. 57(6)—Application of—Order of Ontario Railway and Municipal Board—Jurisdiction—Municipal Corporation—Railways not yet Constructed.*—An order made by the Ontario Railway and Municipal Board, determining, ordering, and declaring that sec. 57 of the Ontario Railway Act, 1906, should apply to the Toronto Railway Company and to the railways owned and operated by that company, and to the Corporation of the City of Toronto and the street railways to be constructed by that corporation, was held to be beyond the powers of the Board.—*Per Moss, C.J.O.*:—The question turns upon the proper view to be taken of sub-sec. (6) of sec. 57, read in connec-

tion with and in the light of the other portions of the section. Under sub-sec. (4) the powers of the Board arise only when there has been inability to agree upon the matters there specified. And these powers are confined to determining in respect of these matters. Sub-section (6) enables the Board to deal with street railways, but does not say that it is to do so under circumstances different from those under which they deal with steam railways, by virtue of sub-sec. (4). There is no warrant for such a wide departure from the manifest object and scope of the section as to adapt it to a case where there are not two existing and operating lines before the Board, upon application made by one or more of the parties interested.—*Per MEREDITH, J.A.*:—Reading the whole section together, and having due regard to the purpose of the Legislature, gathered from the whole Act, sub-sec. (6) applies only to interchange between existing street railways.—*Per MAGEE, J.A.*:—The word “company,” as used in sec. 57, does not include a municipality; and a municipality is not liable under sec. 57 to be compelled to interchange traffic with any street railway or other railway company; and, therefore, that part of the order of the Board which dealt with the city corporation and the railways to be constructed by that corporation, was not within the powers of the Board. The order with respect to the company’s railways would, if it stood alone, be quite within the powers of the Board; yet, being made upon a non-existent basis, and with a view to an impossible result, and made without consideration of its effect upon the



company with regard to any other railway or street railway, it was not warranted in law and should be declared invalid. *Re City of Toronto and Toronto R.W. Co.*, 225.

See CONSTITUTIONAL LAW.

### SUBPŒNA.

See JUDGMENT DEBTOR.

### SUBROGATION.

See ATTACHMENT OF DEBTS.

### SUBSTANTIAL WRONG OR MISCARRIAGE.

See CRIMINAL LAW, 2.

### SUBSTITUTED WAY.

See HIGHWAY.

### SUCCESSION DUTY.

*Bequest of Share of Income of Fund*—"Legacy by Way of Annuity"—*Succession Duty Act*, 7 Edw. VII. ch. 10, sec. 11(1)—*Voluntary Payment to Crown by Executors of Will*—*Death of Legatee*—*Right to Recover Part of Sum Paid*—*Mistake of Fact or Law*—*Improvvidence.*]—A bequest in a will of the interest or income of a fund is not a "legacy given by way of annuity", within the meaning of sec. 11(1) of the *Succession Duty Act*, 7 Edw. VII. ch. 10, but simply a gift of interest or income.—Where the whole of the succession duty attributable to the share of the income from a residuary trust fund bequeathed to a daughter of the testator was paid by his executors to the Treasurer of Ontario, and the legatee died about a year and a half after the death of the testator, when only one of the four "equal consecutive annual instalments" mentioned in sec. 11(1) would

have been paid if the method of payment by instalments had been adopted:—*Held*, that the payment was a voluntary one, not made under a mistake of fact; and, if made under a mistake of law, no part of the money could be recovered by the executors from the Crown.—*Semble*, that the payment was not improvident. *Bethune v. The King*, 117.

### SUMMARY APPLICATION.

See WILL, 4.

### SUMMARY TRIAL.

See CRIMINAL LAW, 3, 4.

### SUNDAY.

See CONSTITUTIONAL LAW.

### SURROGATE COURTS.

*Jurisdiction*—*Payment of Infant's Money into Court*—*Trustee Act*, 1 Geo. V. ch. 26, sec. 37(2)—*Practice.*]—A Surrogate Court has no right to the custody of the property of infants or lunatics; and the Judge of a Surrogate Court has no jurisdiction to order payment of an infant's money into that Court.—Under sec. 37(2) of the *Trustee Act*, 1 Geo. V. ch. 26, the Judge of a Surrogate Court may order payment of an infant's money into the High Court.—Apart from want of jurisdiction, the Surrogate Courts have no machinery for the investment of money in Court; and it is not in the interests of infants that money should be so paid in. *Re Mercer*, 427.

### TAXATION OF COSTS.

See COSTS—PROHIBITION.

### TELEPHONE.

See ONTARIO RAILWAY AND MUNICIPAL BOARD.



**THREATS.**

See CONTRACT, 1.

**TIMBER.**

See BANKS AND BANKING—  
CONTRACT, 3.

**TIME.**

See MUNICIPAL ELECTIONS—  
PRINCIPAL AND AGENT, 1—PRO-  
HIBITION.

**TRAFFIC.**

See RAILWAY, 1 — STREET  
RAILWAYS.

**TRAVELLING EXPENSES.**

See COMPANY, 1.

**TRIAL.**

*Action to Establish Will—Judicature Act, sec. 103—Application for Order for Trial by Jury—Refusal—Discretion—Leave to Appeal—Practice.*—An action to establish a will, transferred from a Surrogate Court to the High Court, is one within the former exclusive jurisdiction of the Court of Chancery, within the meaning of sec. 103 of the Judicature Act, R.S.O. 1897, ch. 51; and is, therefore, to be tried without a jury, unless otherwise ordered.—In the circumstances of this case, a Judge in Chambers refused to make an order for trial by jury; and another Judge refused leave to appeal to a Divisional Court.—Review of the legislation and practice. — *Re Lewis* (1885), 11 P.R. 107, approved and followed. *Jarrett v. Campbell*, 83.

See CRIMINAL LAW—LUNATIC PRACTICE.

**TRUSTS AND TRUSTEES.**

See CHURCH — PARTNERSHIP—  
SURROGATE COURTS—WILL, 2.

**UNDERTAKING.**

See CONTRACT, 4.

**UNDUE INFLUENCE.**

See INSURANCE, 5.

**VENDOR AND PURCHASER.**

1. *Contract for Sale of Land—Authority of Agent—Question of Fact—Appeal—Reversal of Finding of Trial Judge.*—The judgment of CLUTE, J., 25 O.L.R. 229, in favour of the plaintiff, in an action for specific performance of an alleged agreement for the purchase and sale of land, was reversed, upon the ground that P., who was said to be the agent of the defendant, was not, upon the facts in evidence, authorised to make the particular agreement sued upon.—*Per GARROW, J.A.*:—P. was not the agent of the defendant for any purpose. *Maybury v. O'Brien*, 628.

2. *Contract for Sale of Land—Completed Agreement—Statute of Frauds—Memorandum in Writing—Parol Variation—Specific Performance.*—Where by law a written contract is necessary or a parol contract is required to be evidenced by writing, a subsequent parol variation may be ignored, and specific performance of the original agreement adjudged; or, if the plaintiff admits the parol variation, and the defendant desires to avail himself thereof if specific performance is awarded, the Court will withhold specific performance unless the plaintiff assents to yield to the defendant any advantage which he is entitled to under the modification.—Review of the authorities.—Where the plaintiff and defendant entered into an agreement, complete and sufficient in all respects, for the sale by the defendant and purchase by the

plaintiff of land, which agreement was evidenced by a receipt or memorandum, sufficient to satisfy the Statute of Frauds, written and signed by the defendant after the agreement was made, and by a subsequent parol agreement a variation was made in some of the terms, specific performance of the original agreement was adjudged. *Maloughney v. Crowe*, 579.

See DOWER—PRINCIPAL AND AGENT.

### VOTERS' LISTS ACT.

See MUNICIPAL CORPORATIONS, 2.

### VOTING.

See MUNICIPAL CORPORATIONS, 2.

### WAGES.

See COMPANY, 1, 4.

### WATER AND WATER-COURSES.

*Saw-mill Owners — Pollution of Stream — Easement — Crown Patent — Interpretation — Right to Pollute — Correspondence and Documents relating to Patent — Prescriptive Right—R.S.O. 1897, ch. 133, sec. 35—User for Twenty Years — Payments — Interruption—Public Policy—Violation of Statutes—R.S.C. 1906, ch. 115, sec. 19—R.S.O. 1897, ch. 142, secs. 4, 6 — Damages — Injunction.]—A creek running through the township of Grattan furnished two water powers, the plaintiff's and the defendants'. The plaintiff's was below the defendants'. Each had a dam and a saw-mill. Below the plaintiff's dam was a beaver meadow, through which the creek flowed. The plaintiff complained that the*

*defendants, during the years 1904 to 1909, had polluted the stream by throwing their saw-dust and other mill-refuse therein, and thereby caused damage to the plaintiff's mill-pond and water power, preventing him running his mill and causing damage to his land. The defendants claimed the right to do as they had done: (1) by virtue of a grant from the Crown; (2) by prescriptive right at common law; (3) by prescriptive right under the Limitations Act, R.S.O. 1897, ch. 33, sec. 35 (now 10 Edw. VII. ch. 34, sec. 35). By the records of the Crown Lands Department, it appeared that the defendants' lots, through which the creek flowed, were sold to their predecessor in title by the Crown in 1855 for a water power and to run a saw-mill and grist-mill. The patent issued in 1859; it contained no reference to the water power or to the mill. The saw-mill was erected in 1855, and was afterwards enlarged and its capacity increased. The plaintiff's predecessor acquired title to his lot, through which the creek ran, about 1870 or 1872, and began to operate his mill about the same time:—*Held* (RIDDELL, J., dissenting), that the plaintiff was entitled to damages and an injunction restraining the defendants from discharging refuse into the creek to the injury of the plaintiff.—Judgment of LATCHFORD, J., affirmed.—*Per* CLUTE, J., with whom MULOCK, C.J. Ex. D., agreed:—The defendants' right was limited by the terms of the patent, and could not be enlarged by the correspondence and documents of record relating to the grant. *Wyatt v. Attorney-General of Quebec*, [1911] A.C. 489, applied and followed. — 2. The right by prescription under the*

statute is inchoate till action brought, and the user must be continuous and of right. Certain sums of money paid by the defendants to the plaintiff in each of the years from 1896 to 1903 were paid for the damage occasioned to the plaintiff's property by reason of saw-dust and other refuse being permitted to pass into the stream, and operated as an interruption of the user, preventing any prescriptive right from arising.—3. In the circumstances of the case, there could be no presumption of an implied grant of an easement or right to pollute the creek.—4. Upon the evidence, the payments were not made for injury done over and above what the defendants were entitled to do.—5. Upon the evidence and the finding of the trial Judge, the injury to the plaintiff before 1896 was trifling; it was owing to the increased capacity of the mill that the injury was done, and there could, therefore, be no right before 1896, either by prescription or lost grant, to justify what had been done since.—6. There was sufficient evidence to bring the case within the operation of sec. 19 of the Navigable Waters Protection Act, R.S.C. 1906, ch. 115. To foul a stream, being prohibited by Act of Parliament, is against public policy; no prescriptive right can be obtained against the policy of the law; and the same principle applies to prevent the presumption of a lost grant from arising.—*Per RIDDELL, J.* (dissenting):—To determine the rights and position of the parties, it was necessary and proper to look at the records of the Crown Lands Department. *Brady v. Sadler* (1890), 17 A.R. 365, followed.—2. The land was sold for a water

power and to run a saw-mill and a grist-mill. The grant of land carried with it the right to occupy and use the land and stream, in the manner contemplated, for a saw-mill and grist-mill; there was an obligation enforceable by the Crown that the property should be so used; and it was not necessary that the obligation or right should appear in the patent.—3. A grantee from the Crown stands in no better position than a grantee from a private individual. The purchaser who buys to carry on a particular business has an easement over all the remaining land of his vendor, so far as to entitle him to carry on that business in the ordinary way—the vendor cannot derogate from his own grant. The Crown, by what was done, gave the grantee the right to carry on saw-milling in the ordinary way; and that, at that time, permitted throwing saw-dust and other mill refuse into the creek. That it polluted the water was immaterial—a right to pollute water may be acquired by grant, express or implied. — 4. There having been more than twenty years' quiet and uninterrupted user of the easement by the defendants, during the time of the plaintiff and his predecessor, before 1895 or 1896, the existence of a lost grant should be presumed. The doctrine of lost grant has not been affected or become effete by the operation of the statute. *Re Cockburn* (1896), 27 O.R. 450, followed.—5. There being no evidence that the creek itself was navigable, the original of sec. 19 of the Navigable Waters Protection Act—that is, 36 Vict. ch. 65, sec. 1—would not apply; and, even if it did apply and would void a grant



after the statute, there was a time during which the plaintiff's predecessor could have legally granted the easement; and that was sufficient to compel the Court to infer a lost grant at that time. Nor, upon the evidence, could it be found that the later statutes—49 Vict. ch. 36, sec. 7; R.S.C. 1886, ch. 91, sec. 7; R.S.C. 1906, ch. 115, sec. 19—had any application. Criminal statutes are to be interpreted strictly; and the acts of the defendants, continued for so many years, could not be said to be criminal in the sense of violating the statutes of Canada.—6. The Ontario legislation on the same subject, now R.S.O. 1897, ch. 142, sec. 4, from the beginning excepted saw-dust from the prohibition in regard to the pollution of streams; therefore, so far as saw-dust was concerned, there was nothing to prevent the implication that the Crown gave the power to foul the stream; and the same should be held in respect of the other materials from the mill thrown into the stream. If it were contended that the stream was not one within sec. 6 of the Ontario Act, the plaintiff should have the privilege of proving it.—7. In this view, the acts of payment relied on by the plaintiff had no bearing; a right acquired is not divested without something equivalent to a grant; and this applies also to a lost grant.—8. *Semble*, that, if the acts complained of were illegal, there could be no implication that the grant of land for the purpose of a saw-mill also gave the right to violate the statute. And the law would not imply that the lost grant contained a grant of the right, even as against the grantor, to do an act for-

bidden by the law. *Hunter v. Richards*, 458.

## WAY.

See HIGHWAY.

## WILL.

1. *Construction — Conditional Gift—Revocation upon Non-fulfilment of Condition — Distribution among other Legatees Named in Will—Legatee Named in Codicil—Status of, to Question Fulfilment of Condition—Substantial Performance of Condition — Cy-près Doctrine.*—A codicil forms part of the will or testamentary instrument, but not necessarily to all intents and purposes.—The testator, by his will, gave the bulk of his property to his two nieces, but upon a certain condition, to be fulfilled in his lifetime, and which was not made known to them until after his death; and, in the event of their not fulfilling the condition, he revoked the devises and bequests to them, and directed that "their shares be distributed equally among the other legatees named in this my will." A year and a half later, he executed a codicil, by which he gave a small legacy to the plaintiff, who was not named or referred to in the will. The codicil did not in terms say that it was made part of the will, but it confirmed the will and gave other pecuniary legacies to persons not named in the will. After the testator's death, the executor, deeming that the condition had been fulfilled, turned over to the two nieces the property bequeathed to them. The plaintiff, on her own behalf and not representing any other possible claimants, sued the executor and the two nieces for an account and a share of the property transferred



to the nieces, alleging that they had not fulfilled the condition, and that she (the plaintiff) was entitled as one of the other legatees named in the will:—*Held*, that the plaintiff, being a legatee only by virtue of the codicil, was not one of the legatees contemplated in the will, and had no *locus standi* to question the conduct of the executor in making over the property to the two nieces.—*Henwood v. Overend* (1815), 1 Mer. 23, and *Hall v. Severne* (1839), 9 Sim. 515, followed.—*Semble*, that there had been a substantial performance of the condition by the nieces; and, by the application of the *cy-près* doctrine, the condition had been practically satisfied. *Adams v. Gourlay*, 87.

2. *Construction—Gift for Maintenance of Residence—Perpetuity—Intestacy—Trust—Discretion of Trustees—Bona Fides—Power to Sell Lands—Conveyance Free from Charge of Annuity—Charge on Proceeds of Sale.*—Any gift, not being charitable, the object of which is to tie up property for an indefinite time, is void.—The testator devised his dwelling-house and lands and the chattels therein and thereon (except a number specifically bequeathed) to his son, the defendant J. H. K., but subject to certain provisions as to rights of occupation, etc., in favour of two granddaughters. He made other bequests; and then gave the residue of his estate to his executors and trustees “to be used and employed by them in their discretion or in the discretion of a majority of them in so far as it may go to the maintenance and keeping up my house and premises herein bequeathed to my son J. H. K. with full power and authority to

them to make sales of any real estate upon such terms and conditions and otherwise as may be expedient and to execute all deeds documents and other papers necessary for the sale of same and to make title thereto to any purchaser thereof and the proceeds of such sales to devote as in their discretion or in the discretion of a majority of them may seem meet and necessary to keep up and maintain my said residence in the manner in which it has been heretofore kept and maintained and if for any reason it should be necessary that the said residence should be sold and disposed of I direct upon any such sale being completed that the residuary estate then remaining shall be divided in equal proportions among the several pecuniary legatees under this my will.”—*Held*, that the gift of the residue was void as creating or tending to create a perpetuity; and that there was an intestacy as to the whole of the residue.—*Thomson v. Shakespear* (1860), 1 DeG. F. & J. 339, *Carne v. Long* (1860), 2 DeG. F. & J. 75, *Yeap Cheah Neo v. Ong Cheng Neo* (1875), L.R. 6 P.C. 381, and *Rickard v. Robson* (1862), 31 Beav. 244, applied and followed.—*Semble*, that, although the trust was in its nature imperative, and the amount to be expended was left in the discretion of the trustees, they could not at once appropriate the whole fund, regardless of the amount thereof and the amount necessary to be expended, for the benefit of the owner of the dwelling-house, the defendant J. H. K.; the trust must be executed in good faith.—*Held*, also, that the wide power of sale vested in the trustees enabled them to make title to

lands embraced in the gift of the residue free from a charge of an annuity thereon in favour of the plaintiff; but the proceeds of sale would be subject to the charge. *Kennedy v. Kennedy*, 105.

3. *Construction — Gift to Brothers and Sisters—Death of Sister between Date of Will and Death of Testator—Right of Children of Deceased Sister as Secondary Legatees.*]—*Held*, reversing the judgment of RIDDELL, J., 25 O.L.R. 505, upon one of the questions arising upon the will that the children of the sister who died before the testator, but after the date of the will, were entitled to her share of the "remainder" under clauses 7 and 8 of the will.—Review of the authorities. *Re Denton*, 294.

4. *Construction — Secured Debts—Postponement of Payment—Accumulation of Income—Exoneration of General Estate—Charitable Gift—Immediate Vesting—Condition—Gift over to Charity—Rule against Perpetuities—Restraint on Alienation—Election between Gifts—Questions for Determination upon Summary Application for Construction of Will—Costs.*]—The testator, who died in 1910, by his will, made in 1902, directed that his just debts and funeral expenses should be paid as soon as possible after his decease; but that the payment of debts secured by mortgages on real estate or for which his bank stock had been temporarily transferred should be postponed until they had been paid off from the income of his estate; and that none of his bank stock or other securities were to be sold, but were to be distributed according to their market value at the time of distribution. He also directed

that his real estate in the Isle of Wight was not to be sold till after a tunnel or bridge should be made between the island and the mainland, if such should be made within the lifetime of any of his executors or twenty-one years after. He then gave all his property to his executors, "after payment of my just debts and funeral expenses as aforesaid," to be held in trust for certain purposes specifically set out in a number of separate paragraphs. The first was, out of the revenue of his property to pay his wife £150 a year, and to allow her the use, rent free, during her life, of "Pinehurst House, furnished, or of whichever house of mine may be our home at time of my decease." In the 11th paragraph, he specified a number of parcels of real estate, and directed that all these should be conveyed to the Synod of the Diocese of Ottawa to be held by the Synod in trust for an endowment of the bishopric of Cornwall, "whenever the Bishop of Cornwall is being appointed. If the yearly income from said properties, together with any other official income from whatever source, be insufficient to produce a salary of \$2,000 a year for a suffragan Bishop or \$3,000 yearly for an independent Bishop . . . the income of my sixty Hudson Bay shares . . . or such part . . . as may be requisite shall be applied towards the same object." Paragraph 12: "But if it be unnecessary for said purpose so to apply the income of said sixty Hudson Bay shares . . . I hereby bequeath these . . . shares to the University of Bishop's College, Lennoxville . . . to found and endow . . . a Mission Fellowship." Para-

graph 19: “. . . As soon as the obligations on my personal and real estate have been discharged, including the payment of \$5,000 to the University of Windsor, N.S., for which I gave ‘my note at hand,’ then all my real estate in” (three specified places) “shall be transferred to the Synod of the Diocese of Ottawa to be held in trust for the proposed new Diocese or suffragan Bishop of Cornwall . . . subject to the claim of residence, in one or other of my houses, of my . . . wife . . . After all existing claims on my estate real and personal as hereinabove described shall have been satisfied then the accumulation of all rents shall be safely invested to form a fund for duly fitting up the house” (describing it) “as a suitable residence for the future Bishop of Cornwall . . .” Paragraph 20: “I have made all the above bequests to the suffragan bishopric or independent See of Cornwall . . . But if the appointment . . . of such a bishop do not take place within twenty-five years after my death . . . the properties which had been intended for the endowment of the See of Cornwall shall also by transfer become the property of Bishop’s College, Lennoxville, subject to” (certain charges) “and in trust towards the endowment of a Professorship of Natural Science.” Upon appeal from an order made upon summary application under Con. Rule 938:—*Held*, that the gift to the Synod was not void as offending the rule against perpetuities: it was a vested charitable gift, but to be divested in a certain event, also in favour of a charity.—*Held*, also, that the income might be applied to the

exoneration of the general estate, to the extent, if any, to which it might be called upon to answer the secured debts.—*Held*, as to conditions in the will said to be in restraint of sale of certain portions of the testator’s estate, and as to the alleged obligation of the testator’s widow to elect between the gifts to her of a life estate in the testator’s Cornwall house and in a house in the Isle of Wight, that the questions submitted could not be determined upon the present application.—*Held*, also, that the Court should not disturb the disposition of the costs made by the order in appeal, by giving the Synod costs as between solicitor and client.—*Per Moss, C.J.O.*:—In such cases, the award of costs as between solicitor and client is generally confined to the applying trustee or executor.—Judgment of *Boyd, C.*, varied. *Re Moun-  
tain*, 163.

See SUCCESSION DUTY—TRIAL.

## WINDING-UP.

See COMPANY, 1.

## WORDS.

“*And the Products thereof.*”]—*See BANKS AND BANKING*, 2.

“*Caused by the Burning of a Building.*”]—*See INSURANCE*, 1.

“*Competing.*”]—*See PARTNER-  
SHIP*.

“*Creditor.*”]—*See COMPANY*, 2.

“*Deviation.*”]—*See HIGHWAY*.

“*Duly Authorised.*”]—*See CHURCH*.

“*Injuries Happening from Fits.*”]—*See INSURANCE*, 1.

“*Law of the Province.*”]—*See INFANT*, 1.

“*Legacy by Way of Annuity.*”]—*See SUCCESSION DUTY*.

- “*Logs on the Way to the Mill.*”]  
 —See BANKS AND BANKING, 1.  
 “*Municipal Telephone System.*”]—See ONTARIO RAILWAY  
 AND MUNICIPAL BOARD.  
 “*On Residential Streets.*”—See  
 MUNICIPAL CORPORATIONS, 1.  
 “*Proceeding.*”—See COMPANY,  
 1.
- “*Products of the Forest.*”—See  
 BANKS AND BANKING, 2.  
 “*Riding as a Passenger.*”—See  
 INSURANCE, 3.  
 “*Special Renewal License.*”—  
 See MINES AND MINERALS.  
 “*Specialty.*”—See MORTGAGE,  
 1.  
 “*Without Prejudice.*”— See  
 CONTRACT, 1.

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